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Vol. IV

TRANSCRIPT OF RECORD

(Pages 2607 to 3486)

Supreme Court of the United States

OCTOBER TERM, 1947

No. 10

SCHINE CHAIN THEATRES, INC., ET AL.,
APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK

FILED OCTOBER 4, 1946.

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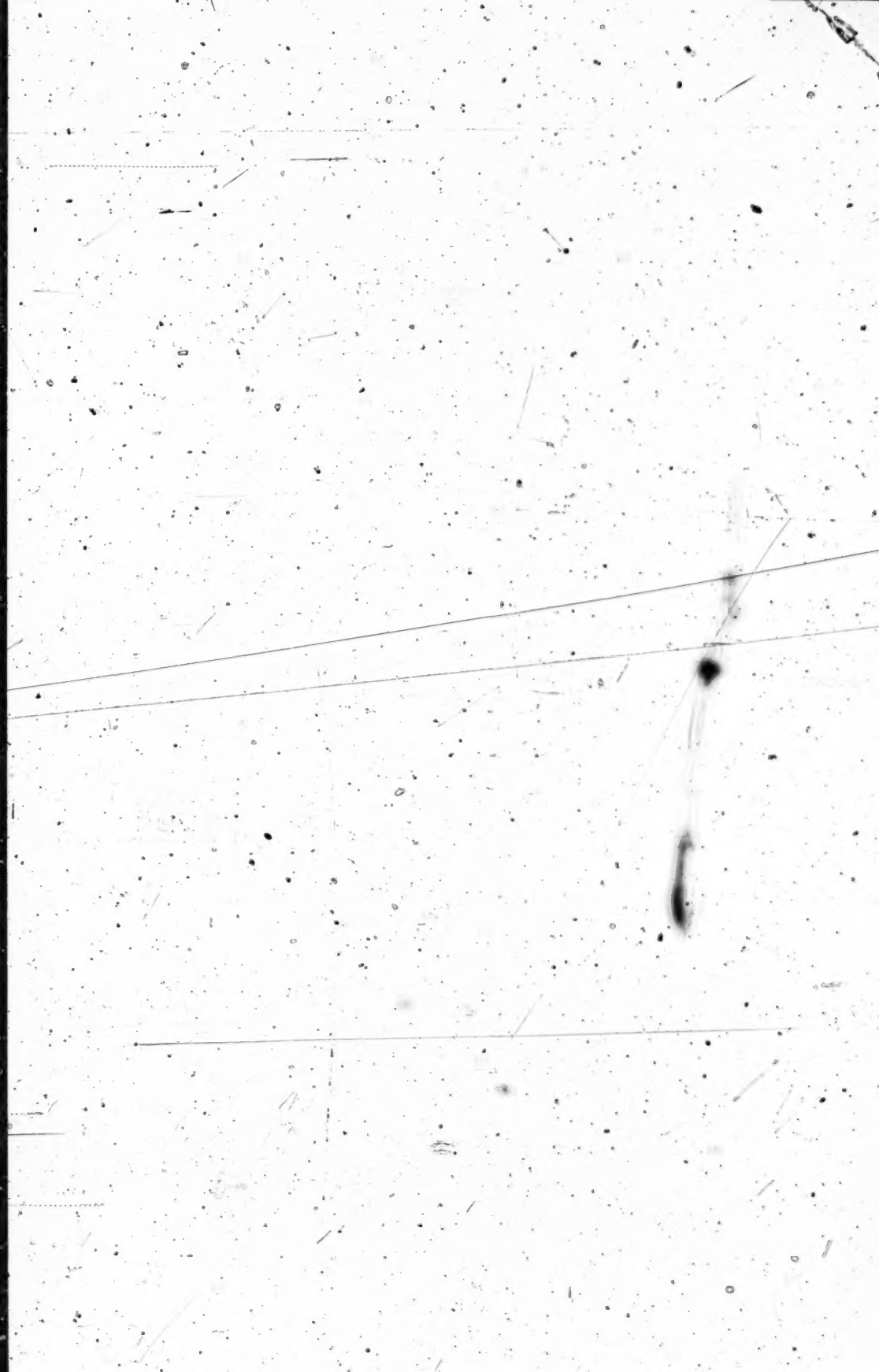

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542. Inter-office communication, Vitagraph, Jan. 12, 1934 from R. S. Smith to A. W. Smith, Jr.

176. Letter, Fox Film, July 9, 1934 from Grassgreen to T. H. Bailey.

178. Letter, Fox Film, Aug. 20, 1934 from Grassgreen to T. H. Bailey.

[fols. 3989-3991] 179. Letter, August 21, 1934 from Tom H. Bailey to Moe Grassgreen.

430. Letter August 26, 1935 from Lynch to Pielow.

435. Letter, Sept. 27, 1935 from Lynch to Pielow.

456. Letter, August 30, 1937, from Booth to O'Shea.

459. Letter, Nov. 1, 1937 from Booth to O'Shea.

476. Letter Feb. 28, 1936 from E. W. Aaron, Metro, to Ralph Pielow.

499. Letter March 19, 1937 from Lynch to Drew.

500. Telegram, March 18, 1937 from Lynch to J. E. Flynn, Metro-Goldwyn-Mayer.

[fol. 3992] UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

Civil 223

UNITED STATES OF AMERICA,

vs.

SCHINE CHAIN THEATRES, INC., et al., Defendants

Continuation of trial before Honorable John Knight, United States District Judge for the Western District of New York, October 31st, 1944, at 10 o'clock A.M.

Appearances: Robert L. Wright, Esq., John F. Clagett, Esq., Harold L. Schilz, Esq., Philip Marcus, Esq., Special Assistants to the Attorney General, and Milton Kallis, Esq., Special Attorney in behalf of the United States.

Edward F. McClennen, Esq., Willard S. McKay, Esq., Saul E. Rodgers, Esq., Arthur E. Whittemore, Esq., Arthur J. Homans, Esq., and Edward M. Antevil, Esq., appearing for the defendants.

[fol. 3993] PROCEEDINGS

Mr. McClennen: If your Honor please, I resume at the point I left off at yesterday afternoon.

The application of the principles of law, which we have submitted, to the conduct of the defendants can best be stated after the facts of that conduct, as they have been proved or are to be proved, are laid before you. Fundamental to the proper appraisal of the defendants' conduct is the development and methods of business of the distributors of motion picture film.

That brings us to a consideration of those methods and what the distributors have done or tried to do. It is of no consequence in the case that is on trial against the defendants whether the distributors, or any of them, have behaved rightly or wrongly in their conduct with the public or with their customers and intending buyers. That broad statement is not cut down by this exception: If the defendants have restrained interstate commerce then it does become important to know whether the distributors or any [fol. 3994] of them has co-operated by agreement in that restraint. It is only in that connection that the conduct of the distributors is of any consequence in this case, and the burden is not upon us to justify in any respect the courses of conduct which the distributors have pursued.

I do not mean by this to indicate that there is anything in their conduct, shown in this case, in any respects reprehensible. I merely point out that we are not called upon to assume the burden of convincing you of a proper appraisal of the rightness of the conduct of the distributors. The only person, the only defendants charged in this case are these or this exhibitor and to that we address ourselves, and it is only in order that there may be a proper appraisal of that conduct that I refer to the distributors at all.

The motion picture industry, in the feature picture sense, had its beginnings about 1912. There is a span of 30 years to be covered before the 19th of May, 1942.

[fol. 3995] I shall constantly make the error, I fancy, of speaking in the present tense. Your Honor will understand, I have no doubt, that when I speak of these matters I am speaking exclusively to what happened before the 19th of May, 1942, as that is the date which the plaintiff has set to the acts of the defendants of which the plaintiff complains, and I use that date only on that account.

Another matter, there was a somewhat substantial change in the methods of doing business by some of the distributors after 1940, pursuant to the decree entered in the District Court of the United States for the Southern District by the consent of the distributors and of the United States, and I speak generally of the methods in existence before that time arrived.

In that span of 30 years there has been, of course, many developments in the industry. The early days are important only as shedding light on the days that are involved in this case.

The producers of film have concentrated their production [fol. 3996] efforts, each one of them, to a considerable extent to California. When I say each one of them, of course, I am speaking of those distributors who are producers, not a distributor like the United Artists that does no producing, and there may be some of the other distributors that do no producing.

The feature film has come to mean a film a mile or more in length, to distinguish it from shorts, single-reelers and two-reelers for other divisions that do not conform to the definition of length necessary to make the production a feature production.

Production in its present sense did not come into existence until about 1928. I chose that date roughly as the time when the production of feature pictures, accompanied by sound, substantially began. That was an extremely radical change, a change in many ways. The acoustical properties of a theatre or a store that had been improvised into [fol. 3997] a theatre were a minor consideration prior to that date as compared with what those were after that date.

The expense of production, the time required for production of a picture was greatly increased by this change. The value of the picture to the producer, the necessary valuation to cover the expense of production, the value of the picture to the distributor to cover those features and to obtain the distributors' appropriate part of the ultimate value of the displaying of his picture was greatly increased.

The amount that he had to charge, and that he ought to charge, was greatly increased. The only way in which properly conceived and carried out, and artistically good and entertainingly valuable pictures could be obtained was by putting large amounts of money into the effort to make this better production. This could not be done unless ade-

quate box office receipts would enable the exhibitor to pay either by percentage or rental the amount which was necessary to meet these costs, and these greatly added costs of [fol. 3998] production. The number of pictures that could be produced by any distributor or producer in a given space of time was greatly reduced because of the added time necessary to gather in, not merely those persons who could have their pictures taken, but those persons who could really act and synchronize their expressions with their actions, and in many cases those who had musical, vocal or instrumental abilities, as well, a tremendous increase in requirements came with that, and a corresponding impossibility of producing as many pictures as might have been produced in the old days before that which took place.

In the marketing of pictures there was, in the early days, a great variation in methods. It was a tremendous undertaking to get any systemization into this industry that would make it possible for a theatre-operator to get pictures in quantity at the time and of the character required for his particular theatre. He could not get them all from one source and there arose the normal business strife [fol. 3999] between the distributors, to have him get as many as possible of his pictures from the particular distributor, and to get the proper time allotted to those pictures for the best results to that distributor. It has become a commonplace that the week end time, conspicuously Saturday and Sunday, but varying in its beginnings and endings in different places, is the preferred time, the time that will bring the greatest attendance and therefore the greatest revenue from the showing of a particular picture.

Each of the ten or a dozen distributors wants to get as much of that time in that particular desirable theatre as he can get. It develops a hard competition between the distributors in this respect. It is a matter that can be determined by the exhibitor by no fixed rules. He has to trade it out in his negotiations with the different distributors. Of course that is done at times by the allocating of those preferred times to the best product of each distribu- [fol. 4000] tor. That presents another complication.

The distributors desire, so far as possible, to have their pictures shown in a given theatre in the order of release of those pictures. That is one of the points at which they strive. Conceivably the dozen different distributors may each produce an outstanding picture, release it on, we will

say, on the 15th of January, and then there is the unsolvable problem, the exhibitor wants to show in his theatre those outstanding pictures at an early date. He wants to show them in preferred times when they will bring in the best results, and there is no solution of that problem. It has just to be cut across to try to get the various requirements, giving to each distributor the preferred time, giving to each distributor an early date, and at the same time endeavoring to conform to the order of release of the pictures.

In the development of the industry it has come about that [fol. 4001] the distributors classify their pictures into annual seasons, beginning about the first of September. It is obvious why that period, or thereabout, in the year is chosen as the dividing time. It is a commonplace that except for summer resorts the summer is the lighter time in the exhibition of motion pictures and the desire is, therefore, to get the product of the year started at a fresh time, in the fall, which under normal conditions is apt to be one of the best times in the year.

This division between the releasing seasons is important, more to get some organization into the industry than anything else. They have got to have periodic limits on their descriptions of their product and therefore when we speak of a releasing season we speak of a year beginning approximately September 1st. That does not mean that the pictures released necessarily must be played even first-run before the first of September of the next year. They [fol. 4002] may extend into the later period, and, on the other hand, some pictures of, what I will call, the September 1 season may be released earlier than September 1. There are incidental cases in evidence already of pictures of, I will say, the '41-42 season, that were released in July of '41. Again, a great deal of confusion may be met unless it is kept in mind that the playing season in the later runs extends way beyond the year of release. To make that specific: A picture released on the 1st of September, on the 15th of August, 1939, belonging to the releasing season of 1938-39, may not get its first-runs all out of the way in the course of the next month. Where those runs take place will determine something of when the second-runs will take place. The second-runs may not be played for many days after the first-run and the subsequent-runs after that.

The clearance that is placed in favor of the first-run upon the second-run may define the time when for the first time the exhibitor may have the right to exhibit the picture, but [fol. 4003] it by no means determines the time at which he can exhibit the picture, for several reasons. He cannot date into his theatre each picture of each distributor that is just expiring with respect to clearance, because he has got to have regard to what else he is going to show in his theatre at that time. He has got to have regard to whether it is the proper time in his theatre to show this picture. The mere fact that it is released does not make it desirable that he should show a picture in which Christmas carols predominate on the 4th of July or that he should exhibit in his theatre, in those areas where there is a high sense of religious disposition, in the Lenten season.

[fol. 4004] He cannot put into his theatre on a Good Friday a hilarious picture without offending the taste of many of his possible patrons. There are an infinite number—infinite is too large a word—there are many reasons why pictures, in the proper exhibition business, cannot be shown immediately they are available. That is only one of the considerations that stand in the way of this mathematical figuring out of when a picture is going to be shown.

There is another very important consideration; that is the matter of positive prints, and before I speak further of its effect in the way that I have just mentioned, I go back to the matter of production.

Since the sound pictures have come in, after the enormous expense of the production of a picture, we have reached only the stage of the negative that is taken. By the way, of course, there is no such thing as a moving picture. Each picture on the reel is a still picture, catching the expression [fol. 4005] or the action of the moment, with another one taken so rapidly that the eye is deceived into the belief that it is a continuous affair, but it is, of course, nothing but a sequence of a very large number of still pictures.

When sound came in first, one of the devices was a separate taking of the sound and that had to be produced, had to be projected, synchronizing with the picture. It was an almost impossible thing. I dare say that you may, yourself, have observed in the early days when the words came out an appreciable length of time after the mouth in the picture was closed, and the synchronization was a matter that could not be fully mechanically accomplished and it was necessary

to have an adjuster sitting right there to correct the difficulty. Then came the putting of the sound track on the reel itself.

Now, after that enormous production expense is by, and the negative produced, there is nothing yet ready for the [fol. 4006] presentation of the picture by the exhibitor. Positives have to be made. A single positive of a picture of feature length is an expensive thing; very small as compared with the production of the negative, but still substantial.

It is immaterial for the present to attempt to state exact figures, but running somewhere from near $200 a particular positive up to several hundred, and particularly in the technicolor pictures.

Now, a picture may be leased for its first-run at, we will say, a $1,000, and the exhibition goes down through subsequent-runs that may get down as low, ultimately, as $25, $20, $15 and $10 rental for that picture, an amount of rental that hardly covers the expense of handling the positive that is furnished to the theatre.

Now, obviously a producer, having a film, could not make a $200 positive for each $10 or $25 theatre or, indeed, for any of the rentals that are commonly charged for a deferred-run, even if it is only deferred to second-run. The possi- [fol. 4007] bility of getting the pictures into these cheaper cost theatres has been brought about by making the positive do as many tours of duty as is possible.

In the United States there is this very large amount of theatres equipped for sound. Whether it is ten thousand or fifteen thousand is unnecessary to resolve for present purposes.

To get this into more concrete position, I refer to some particular district of distribution. The larger dozen distributors have about 30 to 32 different districts in the country called exchange districts. These figures that I am now stating are very approximate only. A distributor having 32 exchange districts may make approximately 320 positives of a particular picture, so that a district can be allocated, say, 10 positives. That district may have 500 theatres within its confines. Some pictures practically every theatre in that district will show; some pictures less than the whole will show. That means that ten positives have got to serve [fol. 4008] possibly 500 theatres.

Now, 10 positives, it is obvious, can serve no more than ten theatres on a given night. That means, in the figures

that I have just mentioned, that a positive has got to go through 50 tours of duty in order to make the ten positives spread over the 500 theatres. The time required for a tour of duty of a positive, on the average, may be in the vicinity of four days to a tour of duty possibly five. A positive going into an exchange center theatre may go out to the theatre that day, back the next day,—if it is a one-day exhibition,—and be inspected in the inspection room and go out again, so that the matter might be accomplished, if it was a one-day showing, in a total of three days, but in those places in the exchange centers it is much more likely that the picture, that the positive will operate in the first-run, it may be a week, it may be for considerably more than that; on the other hand, there is almost no theatre that shows a picture [fol. 4009] that doesn't show it at least two days. The theatres on the extreme limits of the area served out of an exchange may require from one to two days of time to transport the film out to the theatre, the positive out to the theatre, and two or more days to get it back again, with two more days for the time that it is on exhibition in the theatre, and the day for inspection on return, so that you may well have that positive busy for a week in serving that theatre.

The two extremes that I speak of are the reasons for taking four or five days as a fair average time for a tour of duty. That means then that it is going to take from 200 to 250 days for that positive to serve the whole of the 50 theatres that it must serve.

This makes it necessary for these, what I will call mechanical reasons, to have some theatres showing much after the release date. If there were no provisions for clearance and availability, the mere mechanics of the industry would require this length of time before some of the theatres could [fol. 4010] show the pictures.

The same mechanical difficulties that I speak of make it impossible, on the figures assumed, for more than ten theatres in that district to show the picture at the same time.

There is, of course, this strong contest amongst the exhibitors to be the ones to get that print early. It is a contest that manifests itself in the communications with the distributors, but the contest is really between the large number of exhibitors, all of whom are actuated by the same desire to get the print.

When the picture is shown in the first-run, in the principal place, when that positive is engaged, the one possibility of making progress in exhibition is to have the other nine making a first-run showing in nine other theatres so far removed from each other and from this first theatre that their first-run showings will not detract from the attendance at the other places. That is, I am picking places at random. [fol. 4011] One may be shown in Buffalo another in Rochester, another within a small town not within the range of easy access to either of the other two, and so on through ten theatres to which those prints are allocated in exhibition.

Care has to be taken to see that the first-run exhibition is not deprived of its just possible returns by the knowledge of the patrons that they may see the picture within too short a time, either at a less admission price or at a theatre that they like to attend better than the chosen first-run theatre, either because that theatre, that first-run theatre is not convenient to them, or for many other reasons. The important thing is that the showing shall not take place soon enough so that the largest reasonably possible revenue shall not be obtained by the first-run theatre. This is of prime import-[fol. 4012] ance, not only to the exhibitor but to the distributor. This is demonstrably true in the case of percentage pictures. It is about as obviously true in the case of flat rental pictures. In the case of the percentage picture it is a mere matter of computation. The more that comes in at the box office of that theatre the more money directly the distributor receives for that picture. But the flat rentals are determined by the possibilities. The flat rentals of a given year are determined when the contract for that year for that flat rental picture is made, but in determining what that flat rental should be one of the things closely observed is what comparable pictures did in that theatre the preceding season. Of course, the exhibitor wants to get his rental as low as possible, within reason, and the distributor wants to get that rental as high as possible, within reason. One of the tests of what shall be done in bringing one of those [fol. 4013] two points of view into focus is what a similar picture did the year before. Therefore, both the distributor and the exhibitor are interested in what the first-run return at that theatre is, in the long run, quite as much for the flat rental picture as for the percentage picture.

There is another element that comes in. These rentals are determined on prospects of the picture, what the picture

will do. It is a matter of experience that a very fine picture, artistically well-produced, with high expectations, does not take with the public generally, all the public, of particular communities, and as a result the picture is rated, when it is shown, as the trade term is, a "flop". These distributors are doing business over a long period of years with these respective exhibitors. If the development shows that too high a price has been fixed in the original contract it is not a matter of prudent business to insist on the full rental or to ignore the request of the exhibitor for an allowance or reduction.

[fol. 4014] At this point there comes into play a very important item. The distributors recognize the importance of dealing in a businesslike spirit with a businesslike exhibitor. They come to know that exhibitors, some exhibitors, are decent in their negotiations with the distributor. They come to know that other exhibitors are what, in modern slang, are called "chiselers", and that they will try to get allowances which the facts do not warrant. They make allowances to the first type of man and decline them to the second, because they do not believe that they can rely on the representations which the second man makes. This disposition to make allowances is another reason why the distributor is directly interested in what the picture does in the theatre and is, therefore, directly interested in having the service of that picture under such conditions that the box-office receipts will not become lessened by this experience of intending patrons that they can see the picture too soon elsewhere. [fol. 4015] The very large proportion of the revenue of each distributor comes from the first-run exhibitions of that picture. It is useless, for purposes of this case, to attempt to get that into any fixed percentage. It would be different with some distributors from what it would be with others, but with all it is safe to say that it is way above half of the revenue that comes from that first-run production, as against the numbers of second-run that that picture may go through.

In the matter of clearance the most important thing is the sequence of the runs, more important than the length of time of the clearance. It has always been recognized, and is recognized in the consent decree, that the owner of the picture should be able, with a free hand, to determine to whom he

will license the first-run of his picture, because it is known how much there is involved in those words:

"Oh, I have seen that picture before. I am not going [fol. 4016] tonight to that theatre because I have seen that picture before."

The consent decree, of course, fixes no rules of law by a judicial determination of those rules of law, because it was a consent decree and was entered because it was a consent decree, because it was the consent of the parties to it, but it does do this: It shows the approval of a court of justice to a settlement arrangement that has been made by the parties to the litigation, an approval which a court would not give consciously if it was doing any wrong to outsiders. There is in the consent decree, then, this clear recognition of the existing principle of law that the distributor may select his first-run customer.

In the case now on trial we are dealing with the matter of clearance in a very different way from what might have been the case in 1939 when the suit began. As to clearance, of course, the only question would be whether there should be a dismissal of the case so far as that feature was concerned, [fol. 4017] or an injunction against a particular clearance. The latter releases would be inappropriate now, anyway, because the policy of the United States, as evidenced by its consent to the decree, is that there shall be set up tribunals that are at once accessible to any exhibitor who thinks that he is being subjected to too much clearance and who may determine, as fair men of affairs, viewing the situation, whether the particular clearance that the distributor has chosen to place in the first-run contract is unreasonable. That whole department really drops out of any important consideration in this case for that reason. The propriety of imposing clearance is determined by whether that clearance will assist to preserve the revenue of the first-run theatre.

I speak of first-run theatre here for brevity. Of course second-run theatres frequently are given clearance over third or subsequent-run houses, but it is not necessary to [fol. 4018] go into that further detail. The propriety of the clearance is determined by whether it will serve the purpose of preserving or increasing the revenue of the first-run theatre by removing this antagonistic possibility of going to another theatre too soon to see the picture.

Now, the test of that is not at all whether it does or does not hurt the prospects of the second-run theatre. The clear-

ance is properly imposed to accomplish the purpose designed. The distributor owns this picture. He has the right, and it is reasonable that he should exercise it, to determine whether he will exercise it by giving the whole of the exhibition of that picture to one theatre and never giving it to another, just as he might withhold the picture from exhibition all together, and may sell the whole of that license to one theatre, and there is nothing unreasonable in his doing, that if it will serve the purpose of getting the best return [fol. 4019] to that distributor from that theatre, either because it is a percentage exhibition or because he, the distributor, can get a larger rental from that exhibitor if the picture, if the whole exhibition right, is given to that exhibitor.

So far as these five distributors were concerned, a radical change, by agreement, was made in consenting to the consent decree. There was a provision in that that subsequent-run houses should be permitted to apply for subsequent runs of the picture and that the distributor was called upon to furnish some run on particular terms. That was no determination that that was a legal requirement. Manifestly, the consent decree was a matter of compromise and the distributors possibly to give up their existing legal right to sell their pictures for all exhibition to one the theatre. They subjected themselves to this requirement, which has its force by their consent, and the approval of the Court. [fol. 4020] It does not change the law in any way. It still is the law that distributors unaffected by that agreement can sell their exhibition rights of a picture entirely to the customer whom they choose.

Since it is their legal right and reasonable that they should exercise it, that they sell exclusively to one exhibitor in a district, so it is their legal right and reasonable that they should exercise it to sell that picture exclusively to that exhibitor for a period of, we will say, 50 days and then that they shall have the right, so far as that exhibitor is concerned, to sell it to somebody else. I have chosen the expression 50 days at random just to make the position concrete. The thing, of course, which they may not do, any more than the owner of a horse in making a sale may do, is to make use of their legal right to accomplish some sinister result that they are not entitled to accomplish. So long as they are placing the clearance at what in the judgment of the distributor and the exhibitor will bring about

[fol. 4021] the result of giving the best return to the first-run house, their judgment is determinative. It is a business proposition. It cannot be otherwise determined. We have had evidence already in the case, from sources none too favorably disposed to the defendants, that clearance is very valuable to the run and in the periods stated. The chief complainant against clearance has informed the Court that the clearances imposed against his theatres were of real commercial value to the theatres of the defendants which enjoyed the benefit of that clearance.

For these several reasons it would seem that the clearance matters drop out of the case, so far as matters of any importance are concerned, and leave us free to devote time to the matters of real consequence in the case.

I have spoken of the disposition of the distributor in this way to get the most that he can, by way of financial return, out of his picture. There are several other things which [fol. 4022] enter into the consideration in the legitimate, proper negotiations between distributor and exhibitor.

It is manifest that the almost country-wide effect upon the success of a picture is determined by the type of houses in which it is first shown. The effect in a smaller locality than the width of the country is even greater. From this it follows that the distributor naturally, and actually, desires to get his picture shown first-run in the house that he thinks in that locality is the best house for the purpose. That may be because of the repute of the house in the community; it may be because of the type of the theatre in its general characteristics; it may be, and one of the most important considerations, the confidence of the distributor in the type of showmanship that is in operation at that house, whether the operator knows the way of attracting the possible attendance, knows how to advertise in the best way, [fol. 4023] knows what to do in the matter of advertising, knows what, from a sensitive appreciation of the needs of the community, will be the thing that will be most attractive to show in that community at that time. All of these are the considerations that are far more determinative of the choice of the distributor than is the particular financial return in film rental for this particular picture. He is looking at his whole field of operation in that town. He is looking at it for this year and for the years to come.

In dealing with the exhibitor the distributor, of course, is much influenced in his judgment as to which customer to

select by historic considerations. Has he had a long period of satisfactory dealing with this particular proposed customer? Has he had not so satisfactory dealings with the other proposed customer? Has he had more satisfactory dealings with the new customer that comes on the scene than he has had with the existing customer? None of these [fol. 4024] questions are answered by any inflexible rule. If the new house or the renovated house is better in the long run for his, the distributor's revenue, it is a reason, at once, why, if he can get his picture into the renovated house or the new house, on any endurable terms, so that he gets a foothold in that house, it is a reasonable, a fair and proper proposition that he should do so, and these are the considerations that actuate the distributor in determining to which house he should sell.

In the same way, in the spirit of the Sherman Anti-Trust Act for free competition, it is proper and reasonable that the new man should seek to get the desirable pictures for his theatre. It would be quite at variance with the underlying conceptions of the Anti-Trust Act if there were built up a position of prior legal right by reason of what had happened in the past. If, by proper negotiation, the new man can persuade the distributor that his theatre is a [fol. 4025] better one for him to exhibit in, so much better that in the new venture the distributor can afford to give him less burdensome rentals than before, it is important, in order to carry out the spirit underlying the Anti-Trust Act, that the distributor should have the right to do this and that the exhibitor should have the right to make the effort.

There has been much said already about the power of a circuit in buying pictures. There has been little said so far about the importance to the industry and to the attending communities in having a circuit engaged in this business.

Now, the first thing to be noted is that the fact that the circuit operates in more than one state does not change the situation in any way. Exhibition by one exhibitor in one town in one state, being a typical example of something that is not interstate commerce, that does not change its character in any way by multiplication into other states. Each theatre is still engaged in exhibition and not in [fol. 4026] interstate commerce.

There is another way in which the circuit is an important advantage to the industry and to the public. In the long

run, properly prepared and shown pictures cannot be exhibited at admission prices that will not cover the cost of those operations and a reasonable profit thereon. In the long run the attending public is interested in this way, in having the cost of operation from the beginning of the production of the picture to the time when it is passed through its exhibition on that screen, as low as possible, and there is an inevitable reflection in the admission prices, endurable admission prices which the exhibitor can endure to place on the exhibition as against a higher price that he must charge if those costs are higher.

In the negotiation for the pictures it is an expensive thing for a small, single operator to go through all the traveling and negotiating and setting off of one distributor against another in the buying of his pictures, as compared [fol. 4027] with the expense of conducting such negotiation for one hundred or one hundred and fifty theatres at once. There is a great saving in the operation which enures eventually to the benefit of the attending public.

There is something more than this. The distributor, in determining how much he must get from this theatre for this picture, is necessarily influenced by how much he is going to get for this picture in the aggregate from one hundred or one hundred and fifty different theatres.

The distributor is subjected in this way to the appeal of the circuit exhibitor to make him sufficiently low terms so that his circuit can live throughout. If a distributor, instead of having to conduct one hundred and fifty negotiations, by paid employees, can conduct one negotiation, of course, that negotiation is necessarily going to take very much more time and energy from its beginning to its completion than is taken for the single case, but the effect in the saving of administrative expense is great. The competition [fol. 4028] of the exhibitor with the distributor to buy, is a competition in which, if the distributor is to be kept to low terms calls for an intelligent and strong exhibitor to secure those terms.

There is nothing prejudicial to the public interest in the existence of a circuit as a means of getting these pictures from their original production into their display on the screen in the theatres to the satisfaction and enjoyment of patrons well served.

There is another element of high importance in serving this operation, and that is the possibility and the actuality

of the circuit exhibitor having a trained personnel to inspect and care, in the engineering sense, for his different theatres throughout the circuit, giving a care, consideration and protection to the safety of patrons that a small theatre operation cannot afford at all.

The circuit, therefore, is not in any respect intrinsically an invasion of any principles of the Sherman Anti-Trust [fol. 4029] Act.

The possibility of the main relief sought in this case being granted, it seems to me, does not exist. The idea of making a capital case out of this, to execute and condemn to death a circuit, is, I submit, inconceivable.

If the circuit were a production of restraint of interstate commerce there would be a different question presented. I submit that even then it would be inconceivable that the circuit should be extinguished and its assets in theatres beneficently given by the Government to other men who had nothing to do with the production of the result. I say "given," of course, given after an opportunity that might be afforded for some return in money to the circuit on a slaughter sale, forced by a court decree.

[fol. 4030] To approach the matter at all, however, it is necessary to see whether this circuit has been built up by restraint of interstate commerce. That is an entirely different question from whether here, there, or elsewhere, there can be found some instance of what would be called restraint of interstate commerce in a particular instance. I submit that on the facts so far in evidence, and on those to be introduced, there is not even that in the case, but if this were otherwise it still would be important to know whether the growth of this circuit from its beginning has been a normal growth, the result of diligence, skill, perseverance and wisdom, or whether it has been the product, in general, of seizing from other men, by a restraint of interstate commerce, that which they had created. Have these men proceeded in a proper manner as creators of a great volume of commerce or have they proceeded to unreasonably diminish that commerce?

This makes it necessary to bring to your attention the [fol. 4031] growth of this enterprise, to show you that it has been normal, businesslike, and accomplished by a high degree of diligent attention, skill and wisdom.

Mr. Schine's connection with this industry begins almost with the beginning of the feature motion picture industry.

He had theatres before those that play any part in this case. The first theatre that this, I urge, uncalled for attack upon him would, if successful, rip away from him was acquired twenty-seven years ago in Gloversville, where he has lived ever since. It is a striking commentary on this idea that the success has been due to an improperly acquired position to look at that first place. He entered there with an inferior theatre, with others having the best of the product. He operated in such an approved way, with no strength of financial position of any kind, that soon he, and his theatre, was the one that was succeeding in a way that brought about the desires of the operators of the better [fol. 4032] theatres to dispose of their theatres to him. It was no different in character from what he has gone on to since. As an example of what industry, perseverance, skill and wisdom will produce in a competitive world to arouse the envy and jealousy of others, and an effort even advanced by representatives of the Plaintiff to destroy rather than to create successful competitive effort.

By two years he had acquired an interest in the next town, speaking chronologically, whose name appears in this case, Oneonta, in 1919. The third town was Norwich, in 1921. By the beginning of 1923 he was in five towns. One of those was Lockport, where he began in 1922. The next town named was Auburn, where he acquired a half-interest in 1923, getting the other half four years later.

By the beginning of 1924 he was in eight towns. Canandaigua he entered in 1924, Corning in 1924, Rochester in 1924, Geneva in 1924, Salamanca in 1924.

[fol. 4033] By the beginning of 1925 he was in sixteen towns. In 1925 he was in Herkimer, in 1925 he was in Little Falls.

By the beginning of 1926 he was in twenty towns. In 1926 he was in six more towns, making twenty-six of these. One was Malone, another was Ogdensburg, reaching twenty-six towns.

By the beginning of 1927, he was in 1927 in Syracuse, in Watertown, and by the beginning of 1928 he was in thirty-four towns.

By the beginning of 1929 he was in forty towns. In 1929 he sold nearly all of his theatres to Fox-Metropolitan. Why it was not quite all is immaterial to this case. His act was indicative not of seizing upon the motion picture

industry but of reducing greatly his position in that industry.

In the year 1930 he sold several more of his theatres. By the end of 1930 the only towns in which he had formerly had theatres which he retained were Buffalo, Lockport, Geneva, Malone, Massena, Ogdensburg, Rochester, a total [fol. 4034] of seven towns, plus a half-interest in Amsterdam. That is, he was a smaller operator in numbers than Mr. Smalley then owned in a short time thereafter. He was a smaller operator than Messrs. Essick and Fine were at a little later date.

In 1930 he built and opened a theatre in Cortland. This then presents the situation as we enter 1931 when we are confronted with this charge of this powerful operator having such a strong hold on the distributors of motion pictures. It was in the year 1931 that he entered Bellefontaine.

If your Honor please, this is a case of so many, many, many details that it is almost impossible to be sure that one has got them all right. I have tried to state these dates and these numbers after a careful examination, and you will know I am confident that if it develops that an error has been made by me it is fully unintentional and not the result of any failure to try to get the facts in shape to [fol. 4035] present them to you in the most intelligible manner.

Now, one of the towns about which we have heard much is Bellefontaine. In 1931, having acquired property not developed as a motion picture theatre, at an expense of $27,500, Mr. Schine built the Holland Theatre, a splendid theatre, at an expense of $196,800. At that time there were in the town one operating theatre. It seems to me that it was the Strand, but like enough I have got it wrong, and two that were not operating and had not operated for a long time. That theatre, the Strand, if that is the right name, was the one which Mr. Mooney testified was the only thing he had to sell at that time and he sold it for $2500 later. At the time that I am speaking of, if I recall aright, he was not operating the Strand.

Now, the complaint seems to be, about Bellefontaine, that the distributors, having presented to them for the first time an opportunity to sell their first-run pictures to [fol. 4036] a new, up-to-date theatre, costing over $120,000, each decided that they would sell their first-run pictures to

that theatre. I say that it is a misfortune in the pursuit of a just result that we should be brought here in an effort to show that we did something wrong in getting those first-run pictures. We could not have put an enormous investment of this kind into the town unless we had supposed that the common sense, the common business judgment, of each distributor would make him rush to sell us the first-run pictures, rather than sell them to an old theatre, not in good condition, and in a town where this new theatre was wholly adequate to all the needs of the town for motion picture attendance patrons to be served to their liking.

In that same year, 1931, Mr. Schine was in Wooster. The name has been mentioned and therefore I mention it.

The next name that has been mentioned as calling for any real consideration is Mt. Vernon. Mr. Schine was there [fol. 4037] in 1934.

A change had taken place in 1933, with a few immaterial exceptions, and pursuant to an order of Court in bankruptcy proceedings of what I will call Fox-Metropolitan. I don't know just the company but it was that organization to which Mr. Schine had sold in 1929, pursuant to that order of the Court, and with a few exceptions and theatres that Fox-Metropolitan had given up on the expiration of the lease or disposed of otherwise, Mr. Schine got back a lot of theatres that he had obtained originally between 1917 and 1929.

[fol. 4038] He had then again become a circuit of a considerable number of towns; I haven't the figure at hand as to the number. Passing again, Mt. Vernon, acquired in 1934, we come to 1935, when he was in Seneca Falls, in Bucyrus, in Norwalk, in Van Wert and in Perry to the extent of the acqusition of land and the development of a project of a new theatre. In 1936 he was in Lexington and in Paris. In giving these names, I am making no reference to names about which no complaint whatever has been shown in evidence, regardless of the complaints made in the bill of complaint.

In Lexington and Paris, the interests were acquired by the fairest of negotiations, on Mr. Schwartz' own testimony, which the plaintiff has brought to you.

In 1937, he was in Ilion, in Medina and in Shelby. Those are the towns in which the creative genius of this man, his industry, his skill, his intelligence, his wisdom, has

placed him. These are the towns which it is insinuated that it is the duty of the Government of the United States [fol. 4039] to seek to get away from him and to give some one else.

I have spoken of the realities of this great extension which this man has made to the possibilities of interstate commerce, in contra-distinction to the slightest subtraction, reduction of that commerce or any restraint whatever on that commerce.

In that contribution to the commerce, the local opportunity of the community to see motion pictures in properly conducted houses under enjoyable conditions, and at reasonable prices, there has been expended for the cost of land and buildings acquired $6,509,100. There has been added to the facilities for the opportunity for the public of the particular communities to see motion pictures, under those conditions, there has been added in cost of buildings and improvements since acquisition $3,506,400; that is to the properties owned by the defendants. To the leased properties defendants have made additions and improve- [fol. 4040] ments at their expense of $631,600. In addition to this, in the properties only partly owned, the defendants have added about $270,000. That is then in what they have created above what they bought from others, they have added about $4,400,000, which some one has had the heart and the temerity to suggest should be taken away from the defendants and given to some one else at such a sale as the Court might order and at such a price as some one else might be willing to pay.

Now, I have spoken of these facts, before making the specific applications of the principles which we urge govern the case.

I turn to those now, to deal with all the things that have— the classes of all the things that have been suggested on behalf of the plaintiff, in order to submit to you that interstate commerce is not unreasonably restrained by building a theatre, even if it is the only theatre that ever arrives in the town and does not make the builder a monopolist [fol. 4041] of interstate commerce by adding the one theatre to the perhaps ten thousand in the country.

The Court: It is really a question of law. These things you are discussing are questions of law. Why deal with them at this time?

Mr. McClennen: Well, I had thought that the plaintiff, in opening, had announced propositions of law as guiding in the listening to the evidence and that it would facilitate the proper appraisal of the evidence as it went along if I briefly did the same, doing no more, by way of projecting those questions of law before your Honor, before the evidence is introduced, than the plaintiff had done, and intending only briefly to indicate the application to the case on which we are to present evidence.

The Court: The thought I had in mind is, the Court understands the positions. It is a question of the application of law or the question of the construction of law and its applicability to the situation. Go ahead. I did not mean to curtail you. Proceed.

[fol. 4042] Mr. McClennen: I think I have only a few minutes needed for that purpose.

As I said: (1) The building of a theatre does not unreasonably restrain interstate commerce even if it is the only theatre in the town;

(2) Telling a competitor already in the town of a plan to build that theatre in advance of doing it is not a restraint of interstate commerce;

(3) Buying an existing theatre, whether by fair dealing or by arousing apprehension, and with an agreement of the seller not to destroy the goodwill that he is selling by going into the theatre business within a short time in that town, is not a restraint of interstate commerce;

(4) Securing the best pictures on the best runs and terms for the defendants' theatres is not restraint of interstate commerce;

(5) Increasing a market from other theatres for the product of Republic, Monogram and other distributors by buying the needed product of the distributors that have [fol. 4043] been named in this case, the 8, is not a restraint of interstate commerce;

(6) Increasing the competition between the distributors to sell their product in the town where the defendants are the only possible purchasers are not restraints of interstate commerce.

Very briefly stated, I think, that I have stated the only claims of restraint of interstate commerce which has been

supported,—I won't say supported,—attempted to be supported by the introduction of any evidence in the case which we now proceed to the introduction of our evidence in defense.

The Court: You have completed, have you?

Mr. McClennen: Yes, if it please the Court.

The Court: We will suspend now until 2 o'clock.

(Whereupon a recess was taken until 2 o'clock P.M.)

[fol. 4044] After Recess, 2 P.M.

Appearances: Same as before noted.

J. Myer Schine, a witness called by and on behalf of the Defendants, and having been first duly sworn was examined and testified as follows:

Direct examination.

By Mr. McClennen:

Q. Where do you reside, Mr. Schine?

A. Gloversville, N. Y.

Q. How long have you resided there?

A. 27 years.

Q. That is beginning in 1917?

A. 1917.

Q. When did you first enter the business of exhibitor of motion picture film?

A. I was connected in 1914——

Q. Just the time is all I need.

A. —with theatres in Syracuse and then I went — Syracuse to Gloversville in 1917.

Q. Was that consecutive? Was there any extended period of time when you were out of the business?

A. No, that was about a week or two after I sold out my [fol. 4045] interest in Syracuse I went to Gloversville.

Q. The theatres in Gloversville are the earliest which you acquired which are now a part of your circuit?

A. Yes.

Q. Will you inform us what you did, by way of entry into the exhibition business in Gloversville?

A. After I sold out my interest in Syracuse a film salesman told me that there was available a theatre in Gloversville known as the Hippodrome and I went there and found

the theatre was being operated by the Odd Fellows Lodge of that city and I met the Trustees and we worked out a lease by which I agreed to pay a rental of $1500 a year for a period of fifteen years.

Q. You were about 27 years old at that time?

A. About 25 years old at that time.

Q. About 25 years?

A. Yes.

Q. Will you describe that Hippodrome Theatre at that time?

A. The Hippodrome Theatre was originally a skating rink and this skating rink was converted into a motion picture theatre principally by building a false floor in the interior, which gave it a pitch, and installing a projection booth and a screen and some wooden-veneer chairs on the floor, and that's about all that was done to make it appear as a theatre.

[fol. 4046] Q. Do you remember how many seats it had?

A. It had about 750, and also it had a number of steps to walk up in order to get there. The building originally had about six steps to walk up in order to get into the building but when they raised the back of the floor inside it added about six more steps, so it really was a second-story building, with windows on each side, which were covered with some plush drapes to keep the lights out.

Q. Is this a good representation of the theatre at that time?

A. That is just about the way I found it. Some of the men in the picture are still employed in the theatre.

Mr. McClennen: I offer this.

Mr. Wright: Objected to as completely immaterial and irrelevant to any of the issues in the case.

Mr. McClennen: I don't care to press it.

The Court: He described it. I think that is probably sufficient.

Mr. McClennen: Will you mark this for identification?

(Thereupon the photograph of Hippodrome Theatre, Gloversville, referred to was marked as Defendants' Exhibit D-149 for identification.)

[fol. 4047] Q. Now, at this time had you any interest in any moving picture producing company?

A. No.

Q. In any distributing company?

A. No.

Q. In any other theatre?

A. No.

Q. At this time what were some of the prominent producers of the better class of moving pictures?

A. There was Paramount which at that time dominated the field, and there was Fox. Metro was not released under the name—oh, yes, it was released, pardon me, under the name of "Metro".

Q. By the way, let me interrupt you, Metro at that time was a producing company, not yet connected with Goldwyn or Mayer?

A. That is right.

Q. Proceed, what other prominent——

A. And there was a company known as Triangle and there were a number of smaller companies whose names I don't recall.

Q. What other theatres were there in Gloversville at the time?

A. There was a brand new theatre, a very fine theatre known as the Glove.

[fol. 4048] By the Court:

Q. What?

A. The Glove.

Q. The Glove?

A. The Glove. It had been built about a year or two before 1917, and the same people who operated the Glove also had a vaudeville theatre known as the "Family". The Family was also an upstairs house like the one I got, perhaps a little more so, and they played in that house vaudeville and pictures. It was not a nice theatre, but the Glove was a very fine theatre and played pictures exclusively.

By Mr. McClennen:

Q. What were the pictures in those days that the Glove played?

A. The Glove had Paramount and in those days Paramount released 104 pictures. They also had——

Q. You mean 104 pictures a year?

A. Yes, two pictures a week, and they also had most of the pictures released, most of the good pictures released by

various other companies, except Metro and Fox, which were furnishing pictures at the rate of one a week each to the Hippodrome.

Q. This was before the days of double-featuring, was it not?

[fol. 4049] A. Yes, sir.

Q. And do you recall in those days how many changes a week the Glove made?

A. The Glove made three changes a week, I believe. They had no Sundays then.

Q. You subsequently became the owner of the Glove, also?

A. Yes, sir.

Q. In the period before you entered into the Glove in any way, what pictures were you showing at the Hippodrome?

A. Well, when I came there they had under contract "Fox" and "Metro", but in those days contracts were only good for four weeks. Either party had a right to cancel the existing contract, and after I was in Gloversville for about six weeks I had a cancellation from Fox and Metro, both, and they sold the product to the other houses. I succeeded in getting Triangle pictures.

Q. How many were Triangle releasing?

A. Triangle was releasing about 80 a year, but they were then about to discontinue business, and they weren't making pictures regularly, and then I bought some pick-ups, whatever I could get.

Q. And were those your sources of supply up to the time of the Glove, of your entering into the Glove?

A. Yes, sir.

Q. Describe the way in which the possibility of your going [fol. 4050] into the Glove came before you.

A. When I came to Gloversville I found the business in the Hippodrome was very slim, very, very little, and I checked as to the reason why. Some nights when we played a good picture the crowd still wouldn't come, and I came to the conclusion that they don't like to come to the theatre because the theatre was inadequate. Its wash rooms were very bad; projection was poor and ventilation was bad, and I immediately proceeded to correct those phases of the theatre, and after spending about four or five thousand dollars in redecorating and putting in new projection machines, and new screen, and improved ventilation, and the public spaces, the business seemed to improve and had continuously improved until the Odd Fellows asked me to buy

the building from them, and I did buy the building and then made plans to make the Hippodrome into a modern theatre. This required an expenditure of about thirty or thirty-five thousand dollars, which we did, and when we opened the theatre, we had a capacity business every day, and then the owners of the other theatres, through a real estate man, came to me and wanted me to meet them and I did meet them, and they asked whether I would be interested in buying their theatres. After some negotiations I did buy their two theatres.

[fol. 4051] Q. And the Glove you have operated ever since?

A. We have operated it ever since.

Q. And do you remember which year it was that you obtained the Glove, as you have just described?

A. In 1920.

Q. Now, have you a memorandum of the amount that you expended and have expended for the acquisition and improvement of those two theatres, the Hippodrome and the Glove?

A. You mean since to date?

Q. Yes.

A. I think I have, yes.

Q. Tell us, first, how much you expended for the acquisition of the ownership of those two theatres.

A. We paid for the Hippodrome $22,500, and the Glove, $126,000.

Q. What have you put into the building and improvement and equipment since that acquisition?

A. We have spent on the Hippodrome— —

Mr. Wright: If the Court please, I don't like to interrupt, but I think some statement ought to be made as to what the materiality or relevancy is of this situation, before we go into these matters. It is not clear to me.

The Court: I was wondering myself what the relevancy is of these transactions.

Mr. McClennen: The plaintiff is contending that this cir-
[fol. 4052] cuit should be dissolved and these theatres taken from us and I think it is material to show how much we have expended in bettering the theatres.

The Court: The details, perhaps, concerning it might be immaterial. I mean you can show the amounts expended, without the descriptions of the theatres.

Mr. Wright: Even that, if the Court please, the plaintiff is not making any contention Mr. Schine should be deprived of any of these theatres for any amount less than what his investment is in them. I don't see what possible relevancy that investment has.

The Court: I think perhaps the details are unnecessary, but it is all right to show what he expended.

Mr. McClennen: I was simply asking the round amounts.

The Court: I think it was referring to some of the testimony received in the tracing of the purchase, and so on. I will let you show the amount he expended all together.

By Mr. McClennen:

Q. What are the amounts expended in the improvement of the two theatres?

The Court: That is, up to date.

[fol. 4053] A. $227,000 was expended for improving the two theatres.

Mr. McClennen: The next place, if your Honor please, that has been mentioned is Oneonta. The interrogatory answers already read show that the Strand in Oneonta was obtained in October, 1919. The Oneonta, November, 1922——

The Court: That is, the Strand at Oneonta and the Oneonta, you mean?

Mr. McClennen: The Strand at Oneonta was October, 1919. The theatre Oneonta at Oneonta——

The Court: Yes, I understand.

Mr. McClennen: —was November, 1922. And the Palace, formerly the Maxey, was leased in 1923 and the ownership obtained in September——

The Court: What was that last name?

Mr. McClennen: The Palace, formerly known as the Maxey, September, 1927.

By Mr. McClennen:

Q. Will you refer to your memorandum and inform us how much you expended for the acquisition of the Palace and of the Oneonta Theatre, both in Oneonta?

A. Palace, $161,800.

Q. And the Oneonta?

A. The Oneonta, $130,000.

[fol. 4054] Q. Since its acquisition what have you expended on the improvement of those two theatres?

A. About $30,000.

Mr. McClennen: The answers to interrogatories with reference to Norwich show that the ownership of the Colonia was obtained in November, 1921.

Q. Will you refer to your memorandum and inform us the cost of the acquisition of the Colonia?

A. $80,700.

Mr. Wright: If the Court please, we, of course, object to all of this data, on the ground it is immaterial and irrelevant. It seems to me considerable time could be saved. If they want to present a comprehensive memorandum of these expenditures, then we could agree that the witness would testify that those amounts were expended. I don't see the necessity of taking the witness over each one.

The Court: The Norwich may stand on a different basis than the others because that is one of the cities concerning which testimony has been given. That is Norwich.

Mr. McClennen: I will offer the memorandum, if your Honor please, that Mr. Wright suggests, as the next ex-

[fol. 4055] hibit.

Mr. Wright: Well, we would agree that Mr. Schine, if asked about each of these theatres and towns, would testify that the figures set forth here are correct, although we, of course, preserve our objection that all of this data is immaterial and irrelevant, not within the issues we are trying.

The Court: Received.

(Thereupon the memorandum concerning the Colonia Theatre referred to was received in evidence and marked as Defendants' Exhibit D-150.)

Mr. McClennen: Of course, it would serve no useful purpose to read this great mass of figures to your Honor at this time.

The Court: No.

Mr. McClennen: I merely call attention to the fact that the figures are as stated in my opening this morning.

By Mr. McClennen:

Q. When you acquired the Colonia did you acquire the Strand in Norwich at the same time?

A. No, a little later.

Q. How much later did you acquire the Strand?

A. I should say about a year later.

[fol. 4056] Q. Were those two theatres, the Colonia and the Strand in Norwich, both included in the sale in 1929 to Fox-Metropolitan?

A. No.

Q. Fox-Metropolitan did acquire the Colonia?

A. The Colonia on lease.

Q. Did you negotiate with them with a view to their taking the Strand?

A. Yes.

Q. And what conversations did you have on that subject?

A. They did not want to take it.

Q. What happened to the Strand? Did you continue to operate it?

A. No, we leased it to some one else for the period our lease still had to run.

Q. Do you remember how long that was?

A. That was, I should say, about three or four months.

Q. And then at the end of that lease did your connection with that theatre, in all respects, terminate?

A. Yes.

Mr. Wright: Excuse me. Has the period when that occurred been fixed?

Mr. McClennen: That was in 1929.

Q. Describe the Colonia as it was in 1929, '30 and '31?

A. The Colonia Theatre was a large, complete theatre, large stage, good ventilation and good seats, with nice [fol. 4057] entrance and was housed in an extraordinary substantial building which was built by local citizens' subscription. It was regarded as the outstanding theatre in the whole area.

Mr. Wright: I move to strike it out as not responsive.

The Court: The last part may go out, "It was regarded as the outstanding theatre in the whole area."

Q. In the surrounding 50 miles from the Colonia did you know of any theatre approaching equality to the Colonia?

A. Binghamton had as good a theatre, which is 40 miles.

Q. How far away is Binghamton?

A. 40 miles.

Q. With that exception was there any other within 50 miles?

A. No.

The Court:

Q. How far is Norwich from Utica?

A. I should say about 65 miles, 70 miles.

Q. Further than Syracuse?

A. Yes.

By Mr. McClennen:

Q. Describe the Strand at the time your lease of it expired around about 1929 or whatever the date was?

A. The Strand was a much smaller theatre. It had no stage. The ceiling was low and the projection booth was on the ground floor, so when you walked in you had to walk around the booth in order to get in the theatre. It was what [fol. 4058] was known as a glorified store show.

Q. Do you remember the time when you put these $29,500 of improvements into the Colonia, I am referring to Defendants' Exhibit No. 150?

A. I believe improvements were made from time to time, but the major improvements was made in 1938.

Q. That is in 1938?

A. Yes, sir, 1938.

Q. And when those improvements were made, how was the Colonia in reference to modern standards?

A. It was as modern as any theatre could be.

Mr. Wright: Well, if the Court please——

The Court: That is not responsive. I don't know how modern it could be.

The Witness: It had fine cushion seats with springs. It had a ventilating system and was finely decorated with rather attractive marquee, plenty of lights in front, and what was more important, the projection and the sound was the very latest type.

The Court: The outside the same, was the outside changed?

The Witness: Yes, the outside was changed with a new marquee, and the inside had fine carpets, and it was, I would say, an outstanding theatre.

[fol. 4059] By Mr. McClennen:

Q. Has that theatre been operated from the inception of your operation as a first-run run?

A. Yes, sir.

Q. During the time that you operated the Strand how was that operated?

Mr. Wright: I don't think the date has been fixed yet.

The Witness: The operation was the same as had been operated by the previous exhibitor, a Western house, and secondary feature house.

By Mr. McClennen:

Q. When you say a Western house, you mean for the exhibition of pictures?

A. Of action.

Q. Pictures called Western?

A. Yes, sir, Western pictures.

Q. Describe in some more detail what is classified as a Western.

A. A Western, as a rule, is a picture that has a lot of action in it. Usually the story is not too logical, but it has many thrilling incidents which pleases a good many people.

Q. Are there communities in which a Western has a better appeal than a better picture?

A. Oh, yes.

[fol. 4060] Q. What, as your experience goes with the theatre going public, what are the places where you get that?

A. In Kentucky we find Westerns are particularly sought after by the public, much more than the so-called big stars.

Q. The answers to interrogatories show that in Lockport the Palace was acquired in 1927. Had you become interested in any respect in Lockport prior to that date?

A. Yes, sir, 1927, you mean?

A. I think it was 1927 that is in the answer to the interrogatories?

A. Yes, sir.

Q. Can you fix approximately when it was that you became interested in Lockport?

A. I believe it was in 1922.

Q. What was the interest then and how acquired?

A. A real estate agent from Buffalo wrote me,

Q. And as a result of that did you see anybody?

A. Yes, sir. He drove me down to Lockport, and we met Mr. Thurston, the owner of a theatre known as the "Temple" and——

Q. What conversation did you have with Mr. Thurston?

A. Well, Mr. Thurston——

Mr. Wright: If the Court please, how can that possibly be relevant to anything we are trying here?

[fol. 4061] The Court: I will let him state what he did. State what you did.

The Witness: Mr. Thurston told me——

Mr. Wright: No, what you did.

The Witness: What I did? We bought the theatre.

Mr. McClennen: I presume that called for what conversation he had. That is what he did.

The Court: Yes, with the seller.

Mr. McClennen: That is what he is about to give.

Mr. Wright: We object to that.

The Court: If it is limited to what he said he would take for it and what he would give for it, is one thing. If it goes further it is another.

Mr. Wright: If the Court please, I don't see what that has to do with the case. It is an acquisition. There was no testimony offered with respect to this acquisition he is testifying about.

The Court: Was it listed in those just read in evidence here?

Mr. Wright: That is right, but we offered no testimony with reference to negotiations in connection with that theatre, nor the circumstances in the acquisition at all.

The Court: Does it appear in the exhibit the amount paid [fol. 4062] for the Temple and when acquired?

Mr. McClennen: It appears in the exhibit against Lockport, that the Rialto was acquired for $27,500, and the Palace for $200,000, and that the expenditures in the improvement of the building and so forth were $126,400. The name "Temple" does not appear.

The Court: I will let him state—I will let you show what happened to the Temple, but the conversation between him and the seller I don't think is material. It is incompetent.

By Mr. McClennen:

Q. Do you get the limits that his Honor suggests?

A. Yes, sir.

Q. Proceed.

A. We bought the Temple Theatre.

The Court: In 1922, you say?

The Witness: In 1922, about that, I think.

By Mr. McClennen:

Q. Do you remember what amount of money——

A. I think we paid $70,000, I believe.

The Court: Seventy?

The Witness: Seventy.

Q. The answers to the interrogatories, which have been read, show that the ownership of the land for the Auburn [fol. 4063] Theatre was acquired December, 1923, and that the Palace Theatre was acquired as lessee in November, 1923, and the Jefferson was acquired as lessee in March, 1927 to the extent of 50 per cent, and the remaining 50 per cent from the Shea interest in August, 1937.

The Court: Where did you say that was? What town?

Mr. McClennen: Auburn.

Q. Now, pause before you answer this question. What brought the Auburn situation to your attention? You may proceed to answer.

A. You mean from the very beginning?

Q. Yes.

A. Mr. Schwartzwolder, who was operating the Palace Theatre, had written to me to come out and see him.

Mr. Wright: That is objected to, if he is going to go into negotiations here, I don't think that is material.

Mr. McClennen: I judge this is an objection.

Mr. Wright: That is right.

The Court: Well, I will let him——

Mr. McClennen: Then I don't press the matter any further.

The Court: I will let him state how he happened to go to Auburn. I will let him state that.

Mr. McClennen: If the negotiation is so immaterial to this case that the statement of it is objectionable, I don't care [fol. 4064] to go into it at all.

The Court: I don't think so. We are concerned with theatres here. I will allow you to show what was done with reference to them, what was paid for these theatres, as bearing on their condition. I guess it already appears in the stipulation, unless there is something further in the exhibits.

Mr. McClennen: It appears from Exhibit No. 150 that the property acquired in Auburn was at a cost of $83,500, that is, for the Auburn Theatre, and that there was subsequently expended on it $245,000; that the Palace Theatre in Auburn was acquired as lessee and there was expended in the improvement of it $14,500, and that the Jefferson Theatre was acquired by lease, and there was expended on it $4500. These sums, of course, are wholly apart from the sums that the lessors may have expended in the improvement or building of the property and are only the expenditures by the lessees.

Mr. McClennen:

Q. Now, will you describe the Jefferson Theatre in Auburn, New York, as it was when it was being operated [fol. 4065] as your leading theatre there?

A. The Jefferson is a theatre seating——

Mr. Wright: Can we have the date fixed?

Q. It is suggested that we would like the date or the period during which you operated the Jefferson Theatre as your leading theatre in Auburn.

A. That was prior to 1928.

Q. Beginning first when?

A. In about 1927.

Q. And your operation of that as the leading theatre was interrupted by the Fox Metropolitan operation from 1929 to 1933?

A. Yes, sir.

Q. And then resumed by you?

A. Yes, sir.

Q. Now, perhaps the simplest way is to take 1933 and describe the Jefferson Theatre then.

A. It was a theatre that had been built quite some time ago. It had a lower floor seating about 650, a balcony seating around 300 and a second balcony seating another 300. While it was a nice theatre, I wouldn't call it a modern theatre.

[fol. 4066] Q. At that time what other theatres were operating, that is, in 1933, in Auburn?

A. In 1933 there was the Strand, which had previously been a hall built for conventions and concerts, and converted into the motion picture theatre. It was rather old, had no modern appliances, and it had a bad location. And then the Palace, which was a theatre seating about 1100, but lacked modern facilities. And then there was the Capitol, which was an up-stairs house, rather old, and that's all there was in town.

Q. Do you remember when it was that you built the Auburn?

A. In '38.

Q. It appears that you spent $245,000 in the building of that theatre. Why did you build it?

A. Well, the town didn't have a modern theatre and the town needed a new theatre.

Q. Describe the Auburn Theatre.

A. The Auburn Theatre is located in the heart of the city, has a fine large lobby, spacious public rooms, with every modern convenience, has a large auditorium with very luxurious seats, finely decorated walls, refrigerated air, which works on a basis of conditioning the air as wanted, and is very attractive all the way through to the point where it brings people from all around the entire area to Auburn.

[fol. 4067] Q. After you had opened the Auburn that, of course, was your first-run, preferred house?

A. Yes.

Q. And what did you do with respect to the other theatres that you had there?

A. The Palace continued on the same policy I had before. The Strand was at that time condemned by the local authorities, as being unsafe. We closed it and ultimately tore it down. The Jefferson we modernized and re-seated to make it attractive, but we couldn't keep it open regularly for lack of pictures.

Mr. Wright: I move to strike out the latter part. He can testify what he did, but as to why requires some considerable examination.

Mr. McClennen: That is part of what he did.

The Court: He can state whether he was able to acquire pictures.

Mr. Wright: He can state what he did with reference to trying to get pictures for it, but his statement purely that he closed it because he couldn't get pictures; the fact he closed it certainly is not objectionable.

Mr. McClennen: Your Honor; I have been guilty of a court offense in not restraining my merriment as I think [fol. 4068] of the efforts made by my Brother Wright to have other witnesses tell why they closed their theatres. I had those questions in mind in proceeding with this examination. Now I submit that the answer should go forward.

The Court: Well, I think, when the objection is raised, that the witness be required to state what efforts he made, what the results were.

By Mr. McClennen:

Q. Will you state the efforts you made to get product for the Jefferson Theatre?

A. We made every effort possible.

Mr. Wright: Now, I move to strike it out as not responsive.

The Court: Yes.

Mr. McClennen: I should think that was very responsive. It may be rather a generalization.

The Court: Too broad.

Q. Did you direct that any applications be made to people who have pictures for sale?

A. Yes.

Q. Did you participate personally in carrying out of those directions or was it done by others?

A. I participated in some instances but mostly the request for the pictures was carried on by others.

[fol. 4069] Q. What did you find as to availability of pictures for the operation of the Jefferson?

Mr. Wright: That is objected to. If it is important he can recite the negotiations he had and he can have whoever

else he had who participated in them say what their negotiations were, so your Honor would be in position to know whether there were pictures available to that theatre or whether there weren't. I don't think he can make that conclusion for your Honor.

Mr. McClennen: All that is of consequence is to show why the curtailment of the Jefferson operation took place. It doesn't make any difference beyond that.

The Court: It is an important inquiry as to why the questions involved here, as to why he had to close a certain theatre. I think you should make proof of facts, rather than a conclusion. It requires some endeavors to do it, some endeavors should be shown.

Mr. McClennen: If your Honor please, we are not proceeding here in a complaint against anybody for our having been obliged to close the Jefferson Theatre. There is the [fol. 4070] difference. Or curtail its operations. But we are here to show that there is a proper transaction.

The Court: Yes.

Mr. McClennen: By the defendant to curtail his own theatre——

The Court: Yes.

Mr. McClennen: —by reason of the situation that he found to exist.

The Court: Yes, that is very true.

Mr. McClennen: And that is all I am asking.

The Court: I think that proof should be made by showing the efforts that were made, rather than his conclusion, that every effort was made and he was unable to, for the very reasons you suggest.

Mr. McClennen:

Q. Without any generalization as you gave before, state the efforts which you made, either by personal contact or by direction to others, to get enough product so that you could run the Jefferson in full as it had theretofore run.

A. Well, I spoke to two or three representatives, asking whether we could get second-run after the Capitol and Columbia pictures.

Mr. Wright: I ask to have who these representatives were [fol. 4071] and when.

The Witness: Mr. Weinberg was the representative.

The Court: And the other company?

The Witness: Columbia.

Mr. Wright: And when was this?

The Witness: I wanted to buy——

Mr. Wright: When, was the question.

The Witness: That was about, I would say, about three years ago.

By Mr. McClennen:

Q. Would you state again when it was the Auburn opened up?

A. The Auburn opened in '38 and we found that playing in the Palace six pictures, in the new theatre three, and the Capitol absorbing about eight a week, took up all the pictures.

Mr. Wright: That is objected to as a conclusion. He can state what the theatres played, but as to whether that took up all the pictures is something else.

The Court: The direct inquiry is what he did and, if he didn't get pictures, show what happened. You spoke about Mr. Weinberg, one of the representatives?

The Witness: Columbia representatives.

The Court: Did you see anybody else?

[fol. 4072] The Witness: Well, there wasn't anything further that I did myself.

The Court: What did Weinberg tell you?

The Witness: He said he doesn't want to sell second-run in town.

By Mr. McClennen:

Q. At that time how many pictures a week were you playing at the Auburn?

A. Three.

Q. Was that being run as a single-feature house?

A. Single-feature for four days and double the last half of the week, three days.

Q. So that you took one picture for four days and two pictures for three days?

A. Yes. The single-feature was sometimes run three days, depending on the merits of the pictures. Once in a while we run it five days.

Q. How many pictures were you running at that time at the Palace?

A. Palace we ran six.

Q. How many pictures were being run at the Capitol?
A. Six to eight.
Q. So far as other distributors were concerned for pictures for the Jefferson your information was confined to the reports that were made to you with respect thereto, [fol. 4073] was it?
A. Yes.

The Court: What theatres were running first-run aside from the Auburn?
The Witness: The Auburn ran first-run. The Palace had first and second-run. The slough pictures, second-run, and the Jefferson played the week-end with two first-run pictures, but we had to keep closed the rest of the week.
Mr. Wright: I move to strike that "we had to".
The Court: It was closed?
The Witness: It was closed, yes.
The Court: Leave that stand.

By Mr. McClennen:

Q. Was there any reason known to you personally, beyond this lack of pictures that you have described, for closing the Jefferson down to a week-end operation?
A. No.

Mr. McClennen: The answers to interrogatories with respect to Canandaigua show that the Playhouse was acquired in October, 1924, and that the Lake was leased November, 1939, and the Fee obtained August, 1940.

Q. Now, from 1924, except for the period of the Fox-[fol. 4074] Metropolitan, 1929 to 1933, did you operate the Playhouse in Canandaigua continuously?
A. Yes, sir.
Q. And it was run as a first-run theatre?
A. Yes.
Q. And when did you take up for consideration the possibility of building an additional theatre in Canandaigua?
A. I think it was '37.
Q. Did something happened in Canandaigua likely to affect the theatre need of the town?
A. Yes.
Q. What was it?
A. The State was—I don't know whether it was the State or the Federal Government—was constructing a very

large hospital there and it was expected that several hundred families would move into town as a result of it.

Q. Did you make any examination in the town to see what was possible by way of theatre sites there?

A. Yes.

Q. Do you remember when you hit upon the site that you finally acquired?

A. Yes.

Q. And when was that?

A. In '38, I believe.

Q. Do you remember how long a period of time you en-
[fol. 4075] gaged in the efforts to proceed to the determination of a site of building and the necessary plans and specifications and the building and completion of the theatre?

A. About two years, I believe.

The Court: You said you hit on the site in '38. Do you mean by that you acquired the site in '38?

The Witness: Yes.

The Court: Two years to complete the project?

The Witness: About that.

[fol. 4076] The Court: It took two years to complete the present building?

Mr. Wright: I did not hear the last question.

(Question read, as follows: Q. Do you remember how long a period of time you engaged in the efforts to proceed to the determination of a site of building and the necessary plans and specifications and the building and completion of a theatre.")

Mr. Wright: That is objected to, both on the grounds it is leading and calling for a conclusion. He can say as to when it was built. As to what happened in the intervening time, it should be brought out by facts.

The Court: Yes, he should state what was done.

Mr. McClennen: Then do I understand that is all out of the record?

The Court: I understand your question contemplated the consideration of things mentally, perhaps.

Mr. McClennen: I wasn't making any objection. I wanted to be sure that was off the record so I have a clear way to proceed.

The Court: All right.

Mr. McClennen: Then I understand it is stricken out.

[fol. 4077] Q. Do you remember how continuously the building of that theatre and its preliminaries of sketches, plans and building plans and specifications and attempts at bids and actual operation of the building went on?

A. You mean previous to the commencement of construction?

Q. Yes.

The Court: Including the construction.

Q. And including the construction?

A. It took about two years.

Mr. Wright: If the Court please, it isn't clear yet what took two years.

Q. Well, what do you mean, Mr. Schine, took two years?

A. The planning and finishing the theatre.

Q. Were you actuated in any way in taking the steps relative to building the theatre by any knowledge that any one else was thinking of building there or opening a theatre?

A. No.

Q. Did you know that Mr. Wallace had thought of the subject of building in Canandaigua?

A. Well, I heard rumors to that effect.

Q. Do you remember when it was that you heard any rumors about it?

A. I do not remember.

Q. Was it after or before you entered upon this project as you have described in 1937?

[fol. 4078] A. I couldn't tell you because I don't remember as to when the rumors were afloat.

Q. It appears that the first step in the matter of the title to the land was the obtaining of the lease in November, 1939, and that the title itself was obtained in August, 1940. What steps had you taken, yourself, with reference to the project of building there, that is, by way of seeing what could be done in the way of planning a theatre adapted to the land, or to which the land was adapted, do you remember?

A. Yes. I went out to Canandaigua and looked over the various sites and this site was particularly suitable, and the owner came to Gloversville and a lease was negotiated with an option to buy the land and the building. We then proceeded to engage an architect and plans were drawn and the contractor was given the job to construct a theatre,—I

should say reconstruct, because the intent was to use the walls.

Q. That is the walls of an existing building?

A. Of the existing building. The price was fixed by the architect and the contractor as $12,000, but after construction started it appears that an error was made in the planning and one of the walls gave way with the unfortunate result that a man got killed, and that tied up for some time with court litigation, and the contractor refused to go [fol. 4079] through with his plans and did, and for months the matter was argued pro and con, until we had to, in order to get it finished, agree to pay the additional cost in excess of the price which was about, I would say $15,000 or $18,000 more than the price agreed upon by the contractor.

Q. It has appeared from Exhibit D-150 that the property for the Lake Theatre cost $15,000, and that the expenditure thereafter upon it was $38,500; that the Play House had been acquired for $180,000 and there was expended upon it thereafter $16,700. Do you remember when that Play House expenditure took place?

A. I would say about 1937 or '38, '37, probably, I am not sure of the date.

Q. Will you describe the Lake Theatre upon its completion?

A. The Lake Theatre is a smaller theatre than the Play House. It is located in the very busy part of Canandaigua, has fine lavatory space for men and women and seats about 400 or 450. It has fine upholstered spring cushion seats, and the latest projection equipment, as well as sound equipment, and it is very artistically decorated.

Q. You have spoken of the expected increases coming from the hospital. What was the actual development in the town as it turned out?

[fol. 4080] A. As it turned out we kept the Lake Theatre open for some time and lost money and we finally had to close it. The expected increase in population did not materialize.

By the Court:

Q. From the Veterans Hospital, you mean?

A. Yes, sir.

Q. You spoke about a third theatre, I did not get that name.

A. The Lake.

Q. What is that name?
A. Not in Canandaigua, there is a Lake in Rochester.
Q. No, the Play House, Lake and what is the third one?
A. No, there is only two.
Q. Both on the same side of the road?
A. The back of the Lake Theatre abuts the Play House. The Lake is on the main street and the Play House is off the main street. They both go back together with an alley in between.
Q. Both on the east side of Main Street?
A. Yes, sir.

By Mr. McClennen:

Q. Turning to Corning. The answers to interrogatories show the acquisition of the Fox or the Liberty, as it was then known, in October, 1924, and the acquisition of the State in that same month, and the acquisition of the Palace, [fol. 4081] formerly the Regent, in April, 1938. Directing your attention to October, 1924, will you relate what you did to acquire those two theatres, or any others at that time in Corning in 1924?
A. We acquired three theatres in Corning in 1924.
Q. And what were they?
A. They were the Regent, which was later named the Palace; the State and the Liberty which later was rebuilt and called the Fox.
Q. The Liberty at some time burned down?
A. The Liberty burned down.
Q. Do you remember when that was?
A. I think it was in 1924, just when we were acquiring it, and it burned down.
Q. Did you build the Fox?
A. The Fox.

The Court: What is the name?

Q. The Fox?
A. The Fox was built by us.
Q. On the site of the Liberty?
A. On the site of the Liberty.
Q. How soon did you build the Fox after the burning of the Liberty?
A. About three years later or four years later, I believe it was finished in 1929.

[fol. 4082] Q. These theatres passed to Fox Metropolitan in 1929?

A. They did.

Q. And what did you get back in Corning in 1933?

A. I want to make a correction there. The Regent did not pass to Fox. The Regent we sold to a man by the name of Gerber, who was a manager for us. We sold to Fox Metropolitan the State and the Liberty, which was, I stated, later named the Fox.

Q. And the Regent, later called the Palace, was the one that Mr. Gerber acquired?

A. Gerber. The Regent was closed at the time we sold it to him.

By the Court:

Q. What was the last answer, the Regent was closed when?

A. At the time we sold to Mr. Gerber.

Q. That was subsequently known as the Palace?

A. The Regent is known as the Palace now.

By Mr. McClennen:

Q. Did you have to do, yourself, with the acquisition of that property in 1924?

A. Yes, sir.

Q. And from whom did you acquire it?

A. From Mr. Dygert.

Q. Did you acquire other theatres in other places from him?

[fol. 4083] A. Yes, sir.

Q. As a part of the same transaction?

A. Yes, sir.

Q. There was, when it came to you then, what—or, there were what theatres in your operation in Corning?

A. When it come back from Fox Metropolitan?

Q. In 1933, yes.

A. The State and the Fox.

Q. What other theatres were there in 1933 in Corning?

A. There was the Palace and across the bridge was the Plaza.

Q. And the Palace was in the operation of Mr. Gerber?

A. Yes, sir.

Q. And the Plaza of Mr. Gaby and Mr. Cohen?

A. Yes, sir.

Q. Will you describe your two theatres separately as they were in 1933?

A. The Fox was a brand new theatre. It had all modern improvements and appointments. It had been finished in 1929 as stated and had all the very latest equipment. The State was an old theatre, in good condition, but had not been running regularly. I think they were running it week-ends, and when we took it over we followed that policy.

Q. Now, describe the Palace.

A. The Palace was a smaller theatre, seating about 500. [fol. 4084] Mr. Gerber had expended some money and made a rather attractive, little theatre out of it, and it was specially well located on the main street.

Q. Now the Plaza?

A. Well, the Plaza was located across the railroad track. It had a community of its own, with several stores, and it is a small theatre and lacks in modern appliances.

Q. The Fox was operated as the first-run theatre, was it?

A. Yes, sir.

Q. From the time it was built?

A. Yes, sir.

Q. And has continued to be ever since?

A. Yes, sir.

Q. What was the operation of the State in the period from 1933 to——

A. Well, the State closed and opened, and operated intermittently, and usually it ran week-ends, but occasionally we tried to operate it for a full week.

Q. What, in the period from 1933 to 1938, was the operation of the *Plaza*?

A. The *Plaza* ran first and second-run pictures.

Q. What was the operation of the Plaza?

A. Well, they ran mostly Western pictures, some second and third-run.

Q. Do you know, was the Plaza built as a theatre, or was [fol. 4085] it renovated over?

A. It is a converted store theatre, but it is a little better than the average store show. It has a high ceiling.

Q. Will you relate the facts of your acquisition of the Palace from Mr. Gerber in 1938, or leading up to that acquisition?

A. Mr. Gerber had sent for us, or for me, rather, and I could not go down to see him, so I sent down Mr. May, and he worked out a lease with him for ten years, whereby we

paid him an advance rental of $7500, I believe, and I think we were paying him a rental of either $6500 or $7500 a year. He complained of illness and wanted to retire and——

Mr. Wright: I move to strike it out. This is a conversation that he apparently had with some one else, I take it.

The Court: Well, of course, if he talked with Gerber—he said Mr. May did this.

Q. This you were about to state was not of your own knowledge?

A. No, Mr. May told me Mr. Gerber was very sick.

Mr. McClennen: Then I consent to that going out.

Q. At the time of your acquisition of this lease, did Mr. May make some report to you of what Mr. Gerber had told him as to his reasons for retiring?

[fol. 4086] A. Yes, sir.

By the Court:

Q. What did you say you paid him? You said something about $7500.

A. $7500 advance rent, and I don't remember, your Honor, whether it was $6500 or $7500 a year for a ten-year lease.

By Mr. McClennen:

Q. The answers to interrogatories as to Rochester show that you acquired some interest in the Webster Theatre in 1927. Prior to that acquisition you had some talk, did you, with Mr. Tishkorf?

A. I did.

[fol. 4087] Q. At that time what theatres did you have, in one way or another, in Rochester?

A. You want me to give you the names or just the number.

Q. The names.

A. The Grand, the Liberty, the Riviera, the State.

The Court: We will suspend for five minutes.

(Short recess taken.)

By Mr. McClennen:

Q. It has appeared that there was an acquisition of the Grand by you in 1924. Was that the beginning of Rochester, as far as you were concerned?

A. Yes.

Q. At the time of the conversation with Mr. Tishkoff was Mr. Fogel also present?

A. You mean the first conversation?

Q. Yes.

A. No.

Q. It was Mr. Tishkoff alone?

A. Alone.

Q. Now, at that time, it has appeared, there was a Plaza Theatre between the proposed site of the Webster Theatre and the existing State Theatre. Did you have anything to do with that theatre, the Plaza?

A. No.

[fol. 4088] Q. Do you know who was the operator of that theatre?

A. I can't recall his name. He was a Colonel, called as such, "Colonel," and I don't remember his name.

Q. Will you come to the conversation that you had with Mr. Tishkoff, the first conversation, on this subject of a proposed Webster Theatre?

A. Well, the conversation took place rather informally at the Seneca Hotel, in the lobby. I met him there and we chatted, and then I asked him whether it was true that he and his associates proposed to build a theatre in the neighborhood of the State and the Plaza and he said it was true, and I asked him whether he thought the location was suited for a third theatre. He said he didn't know. I then asked him, "How did you happen to get into it?" He said, "I don't know. My partner got into it and I just went along with it, but" he said "why don't you come up to my office tomorrow and I will have all my associates there and see if we can't work out something whereby we might have a partnership in the theatres?" And the next day I did go up. Mr. May went along with me and Mr. Schafer, who was a local manager, went along, and we met in Mr. Tishkoff's office of the Murray Theatre and there was Mr. Fogel and two other men—I can't think—who was it—Mr. Robfogel [fol. 4089] and someone else. I don't know his name. And we talked about a new theatre they proposed to build and I pointed out——

Q. No, not what you pointed out.

A. I told them——

Q. Just the best that you can, after seventeen years, relate that conversation. Somebody said something and somebody else said something, and who said it, and what it was.

A. I told the group of men there that the neighborhood is already over-seated and that the Plaza had just been remodeled and there isn't enough room for a third theatre, and we talked pro and con, and talked the possibility of forming a partnership, but we couldn't get anywheres. I was not agreeable to it and——

Mr. Wright: I move to strike that. Let him say what he said.

The Court: He objects to the word "agreeable."

Q. Just how you put it.

A. I told them we wouldn't go into partnership and I told them they were over-seating a neighborhood and there is no reason why they should; if they really wanted to build a theatre there were so many other neighborhoods where a theatre is needed, but they said they owned a lot and they were going ahead with it. Well, I said there was no sense to it, any more than there would be sense in build-[fol. 4090] ing a theatre in the neighborhood near the Murray, and after some conversation about different things I left their place, and that terminated that conversation that we had.

Q. Have you stated all that you recall that occurred in that conversation?

A. Well, I don't remember of anything else.

Q. Was anything said in substance that if they persisted in going ahead with the Webster project that you would put in a theatre next to the Murray?

A. No.

Q. Anything approaching that in any way?

A. No.

Mr. Wright: Well, if the Court please, just say what was said.

The Court: Yes.

Mr. McClennen: Well, I have asked him what was said.

The Court: You said "anything approaching that." He can state the conversation. He said there was no talk about it.

Q. Is it the fact that there was no talk about the possibility of you building another theatre near the Murray, beyond what you have already stated?

A. It is a fact.

Q. When did you next have any conversation with Mr. Tishkoff or with Mr. Fogel, touching the subject of the Webster project?

[fol. 4091] A. We had several talks. I used to go to Rochester quite frequently and we would meet in the hotel and talk generally.

Q. Now come to the first one you can remember where there was anything said about this Rochester project, and do the best you can to tell us who said what?

A. Well, I met Mr. Tishkoff and Mr. Fogel together and they——

Mr. Wright: Can we have the time of this and the place?

Q. Can you fix the time in any way?

A. Oh, that was the same year when they were building the theatre. It was in about '26, I believe, or '27.

Q. It has appeared, I think, that the actual date was 1927.

A. Yes. Well, they told me how they had gone ahead and that the theatre is reaching completion and that they thought it would be an advantage to both if we could form a partnership whereby we would take a half interest in the lease and I asked him on what terms. They said, "$20,000 a year rent," and I told him, "I will think the matter over."

I met him again later——

Q. Let me interrupt you. This was a lease that was to be taken from this group?

A. Yes.

Q. As the owners of the property?

A. Yes. Mr. Tishkoff was one of the owners of the [fol. 4092] property, and four others. I met him again and at that meeting they had Mr. Robfogel and Mr. Bigger, was one of the men, and they were willing to form a corporation in which we would have a half interest and they would have a half interest. This corporation would lease the Webster from the owners but to do that they told me the leasing corporation would have to put up $20,000 as advance rent, of which I would have to put up ten, and I also would have to take half of the product run first in the State and give them. We, in lieu of that, would get a con-

tract to buy the pictures and we would get five per cent of the gross receipts. The operation, however, would be in the hands of Mr. Fogel.

After some weeks I agreed to that.

Q. In all of this had anything more than you have now stated been said in any of the conversations with reference to the Murray Theatre, or any project of building a theatre near the Murray Theatre?

A. No.

The Court: When was the Webster built?

The Witness: In '28.

The Court: '28?

The Witness: Yes, I think that is the date. The State was built about a year before that.

[fol. 4093] By Mr. McClennen:

Q. Was anything said in any of those conversations about your buying power, if a theatre was put up near the Murray?

A. No.

[fol. 4094] Q. My associates called to my attention that I haven't asked you about the type of theatres in Lockport. Will you describe the theatres in Lockport, taking it at first when you acquired your interest, as you have already stated, and take them one by one and describe the Rialto?

A. When we first acquired the Temple, it was an old theatre, built cheaply, and lacked in modern appointments and equipment. Its projection was good, but the seats were not, and the building was a very cheaply constructed building. At that time there was one other theatre which was a rebuilt store show and it was known as the Hi-Art. After we acquired the Temple we found business was exceedingly good, in spite of the poor theatre we had, so we decided to build a new theatre and, after looking around for sites, Mr. Thurston, of whom we bought the Temple, suggested that we buy his building across the street, which had at one time been operated as a skating rink, but was at the time we speak of used as a garage, a very large building. I looked it over, brought an architect to make a survey as to its suitability and we finally bought the building. We then proceeded to rebuild it into a modern, large picture theatre.

At about the same time a group of men started to build the Palace Theatre and, rather oddly, they used the same

[fol. 4095] architect. Our theatre was finished several months before the Palace was finished, and it was then opened for first-run pictures.

Q. And this theatre you are now describing is the——

A. Rialto.

Q. Rialto?

A. Rialto. The Rialto had a great advantage over any other theatre they had there before, because it had a very large downstairs seating capacity; had about 1500 seats on one floor and only about 75 or 100 in the balcony. After the——

Q. Well, now, next describe the Palace, when it was subsequently completed.

A. The Palace was a very fine theatre too and it was built primarily for vaudeville; a big stage, high loft, and a very large balcony with boxes around the sides and the theatre was leased to Paramount by the owners.

Q. Well, now, what became of the Temple Theatre?

A. The Temple, if you don't mind, I would like to go on further, if you want a little more about the theatre. In the meantime, and at the same time, the Hi-Art was also rebuilt into a much larger and better theatre than it had been before.

Q. Who did that?

A. This was done by a man named Lannigan, so the town, from having no theatre worth while, had three good [fol. 4096] theatres, and the Temple was the poorest of the three, and the product situation was so bad we ultimately tore it down.

Mr. Wright: I move to strike it out.

The Witness: We could not get pictures for the Temple, so we tore it down.

Mr. Wright: I move to strike it out.

The Court: Strike it out.

The Witness: Well, all right.

Q. Well, you tore the Temple down?

A. I tore the Temple down.

Q. Apart from the product situation as you discovered it to be, was there any other reason why you tore the Temple down?

A. Well, there was no reason except we didn't do business in there.

Q. Then did the Hi-Art and the Rialto go over to the Fox Metropolitan?

A. No, if you don't mind, I want to correct you a little. The Hi-Art we didn't own at that time.

Q. Did the Rialto go over to the Fox Metropolitan?

A. No.

Q. After the ending of the Temple did you operate the Rialto?

[fol. 4097] A. Well, we operated while the Temple was there as well as afterwards the Rialto Theatre.

Q. And during the time that you were operating the Rialto, and the Temple, was Paramount operating the Palace?

A. Paramount had also taken a lease on the Hi-Art, and after an attempt to operate it for a while, they closed up the Hi-Art and they were then operating the Palace. We were operating the Rialto, and come to think about it, we operated for a while the Temple, too. They played vaudeville and pictures in the Palace, and we played the best pictures in the Rialto.

Q. What was played in the Temple?

A. In the Temple was played secondary and second-run. By "Secondary" I mean slough pictures.

Q. Now, you say that—am I right that Paramount closed the Hi-Art?

A. Yes, sir.

Q. You continued on operating the Rialto?

A. Yes, sir.

Q. There came a time, it has appeared, when the Palace went into the Dickinson operation?

A. That was later.

Q. That Palace was owned by the Elder-Dickinson, the father of the witness here?

A. No, it was owned by a group which was controlled [fol. 4098] by the Elder Dickinson.

Q. Now, when the younger Dickinson began to operate, either for himself or anybody else, the Palace, what else was done in the operation in Lockport?

A. When he first began to operate the Palace?

Q. Yes.

A. The Rialto was then the only theatre in operation.

Q. And how long had it been since there had been any other theatre except the Rialto in operation?

A. You mean how long after——

The Court: When he took over.

Q. When he took over.

A. After he took over, well——

Q. At the time he took over?

A. We were ousted from the Palace and we then proceeded to——

By the Court:

Q. You were ousted from the Palace?

A. Yes, sir.

Q. You rented the Palace from Dickinson?

A. No, we had the Palace after that.

By Mr. McClennen:

Q. When did you acquire the operation of the Palace?

A. Well, I believe it was in 1928 Paramount was operating the Palace and we were operating the Rialto, and we were [fol. 4099] both losing heavily——

Mr. Wright: I move to strike out as to what Paramount was doing, not responsive.

The Court: Well, when were you operating the Palace?

The Witness: In 1928 we started to operate the Palace as well as the Rialto.

By Mr. McClennen:

Q. And you continued to operate the Palace and the Rialto, both of them how long together?

A. About two or three years, I would say.

Q. And during the latter part of that period was there any other theatre operating in Lockport?

A. You mean while we were operating the Palace and the——

Q. Rialto.

A. And the Rialto? No.

Q. And what was the operation which you conducted in each of those two theatres during the time that you were operating both of them?

A. The Palace played vaudeville and pictures most of the time. Part of the time it played pictures only. The Rialto played the better pictures at one period. Later——

Mr. Wright: If he means better than what played at the Palace, I move——

The Court: What do you mean?

The Witness: The best pictures, the first-class pictures. [fol. 4100] Later, however——

Mr. Wright: I think he ought to state what pictures they played, what companies played at various theatres, and your Honor can draw your own conclusion as to which had the better pictures.

By Mr. McClennen:

Q. Well, if further detail is desired, what picture was the Rialto playing first-run in those days?

A. You mean in the early part?

Q. I am now speaking in the period when you were operating the Rialto and then took up the operation of the Palace?

A. At the time the Rialto was playing the first-class releases.

The Court: The first-run, you mean?

The Witness: First-run.

Q. And do you remember of what distributors?

A. Well, of all distributors.

Q. Then when you lost the lease of the Palace you had on your hands the Rialto in operation and the Hi-Art idle, is that correct?

A. Yes, that is correct.

Q. Have I omitted something that is in your mind?

A. Yes, sir, if you don't mind me telling it. Later we found vaudeville in the Palace wasn't paying.

[fol. 4101] Mr. Wright: I object to that.

Q. Wasn't paying?

A. Wasn't paying.

Mr. Wright: I object to that volunteered statement.

The Witness: We dispensed with vaudeville and we found——

Mr. Wright: Before he goes any further, I think he ought to be examined by counsel and give a response to counsel.

The Court: State what you did, you discontinued vaudeville?

The Witness: Yes, and we moved the best pictures we had into the Palace.

The Court: From the Rialto?

The Witness: Out of the Rialto.

The Court: First-run, you mean?

The Witness: Yes, and we played at the Rialto first and second-run and Hi-Art was still closed.

By Mr. McClennen:

Q. Then when you lost the lease of the Palace, you were engaged up to that time in the operation of two theatres in Lockport?

A. Yes, sir.

Q. And the loss of the Palace reduced you to one operating theatre?

A. Yes, sir.

[fol. 4102] Q. And from then on what did you play at the Rialto?

A. We then picked the first-class, first-run pictures and then we proceeded to make the necessary improvements in the Hi-Art and put the policy of the Rialto into the Hi-Art.

The Court: What?

The Witness: The policy of pictures, the same pictures that we had at the Rialto we moved over to the Hi-Art.

By Mr. McClennen:

Q. So that your Rialto was then your best first-run house, and the Hi-Art was your second best of first-run, and your second-run?

A. Yes, sir.

Q. And that operation continued on——

A. Until about 1937.

Q. It has appeared from the answers to the interrogatories that the Palace operation by you ended in December, 1932. Do you remember at that time whether or not you had made your contracts for Lockport product for the releasing season of 1932-33?

A. We had our contracts made at that time.

Mr. Wright: If the Court please, that is a crucial date. The contracts themselves would be the best evidence if they are available. If they are not available, then we [fols. 4103-4104] can take this.

Mr. McClennen: I don't know whether they are already in evidence or not. I should have to check over the mass of exhibits.

Q. Put in another way, whatever contracts were made by you for Lockport for the 1932-33 product, had they been negotiated before December, 1932?

A. Yes, sir.

The Court: Did you say before December, 1932?

Mr. McClennen: Before December of '32.

The Court: Oh, yes.

Mr. McClennen: I am using that date because——

The Court: It is all right.

Mr. McClennen: Because of the answers to the interrogatory showing that was the time when this operation of the Palace ceased.

The Court: Yes.

Mr. McClennen: Now, if your Honor please, I hate very much to speak of a personal matter, but I have been standing on my feet for six hours now, except for the noon intermission.

The Court: I know what is following. I intended to adjourn at five. We might as well adjourn now.

(Whereupon a recess was taken until November 1st, 1944, at 10 o'clock.)

[fol. 4105] UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

Civil. 223

UNITED STATES OF AMERICA

vs.

SCHINE CHAIN THEATRES, INC., et al., Defendants.

Continuation of trial before Honorable John Knight, United States District Judge for the Western District of New York, November 1, 1944, 10 o'clock A.M.

Appearances: Robert L. Wright, Esq., John F. Clagett, Esq., Harold L. Schilz, Esq., Special Assistants to the Attorney General, and Philip Marcus, Esq., and Milton Kallis, Esq., Special Attorneys, in behalf of the United States.

Edward F. McClennen, Esq., Willard S. McKay, Esq., Saul E. Rogers, Esq., Arthur E. Whittemore, Esq., Arthur J. Homans, Esq., and Edward M. Antevil, Esq., appearing for the Defendants.

[fol. 4106] PROCEEDINGS

J. MYER SCHINE resumed the stand in behalf of the Defendants, having been previously sworn, was examined and testified as follows:

Direct examination (continued).

By Mr. McClennen:

I am sorry to open the month confessing an error. On page 4032 of the opening I said that the half-interest in Auburn was acquired in 1923. I should have said the whole interest.

By Mr. McClennen:

Q. Resuming, Mr. Schine, with Lockport, on which we were at the close yesterday, it appears from Defendants' Exhibit D-150 that the original acquisition cost of the Rialto was $27,500 and the building additions, and so forth, thereafter $118,400. Was that $118,000, the bulk of it, expended in the early development of that theatre?

A. Yes.

Q. And that would be along in the middle '20's?

A. Yes, that was in '23, I would say.

The Court: Did you buy the Rialto as early as '23, you say?

The Witness: Yes, might have been a little later.

[fol. 4107] The Court: You had the Temple in '22?

The Witness: It might have been '24, thereabouts.

By Mr. McClennen:

Q. Coming now to Salamanca in 1924——

The Court: '24, did you say?

Mr. McClennen: 1924, yes.

Q. What did you acquire in Salamanca at that time?

A. The Andrews Theatre.

Q. When was the land acquired on which you subsequently built your new theatre?

A. I think it was in '27, if I am not mistaken.

Q. When did you take up with the architect the matter of preparing for building on that land?

A. In '38.

Q. And can you tell me what time?

The Court: You bought the land in '27?

The Witness: Yes.

A. I would say about the middle of the summer of '38.

Q. I ask you to refresh your recollection from this letter which I show you, or copy of letter, and tell me when you sent the blue prints to the architect?

A. According to this letter——

Q. No, not according to the letter. I want you to look at the letter and tell me——

A. In August.

[fol. 4108] Q. What time in August?

A. 23rd of August.

The Court: '38?

The Witness: '38.

Mr. Wright: Could we have that marked?

Mr. McClennen: The paper referred to is marked for identification.

(Thereupon the copy of letter, dated August 23, 1938, referred to was marked as Defendants' Exhibit D-151 for identification.)

Q. Describe that theatre on its opening.

A. You mean the new theatre?

Q. The new theatre.

The Court: Did you say when it was opened?

Q. Do you recall when it was opened?

A. It was opened, I think—it was started in '40, construction started in '39 or '40, I don't remember. It was opened about a year later.

Q. Now, if you will describe.

A. It is a theatre seating around 1,250, and is constructed of brick and steel. It is fire-proof and has all modern conveniences for public spaces and wash room facilities for men and women. It has a large lower floor and balcony, with stores in front.

The Court: That would be on the south side of Main [fol. 4109] Street or on the north?

The Witness: Well, your Honor, I couldn't quite tell.

The Court: On the opposite side from the Dudley Hotel?

The Witness: It is on the other end as you drive in.

The Court: Across the River, is it?
The Witness: Yes.
The Court: Oh, yes, I recall that, on the left-hand side.
The Witness: Yes.
The Court: I know most all of these towns pretty well, to which you refer here.

[fol. 4110] By Mr. McClennen:

Q. From Exhibit D-150 it appears that you expended in the original acquisition, at whatever the date was, I think you said 1927, $24,300, and in the construction and improvement thereafter $164,300.

The Court: Three hundred what?
Mr. McClennen: $164,300.
The Witness: That is right.

Q. Coming now to Syracuse, in 1927, according to the answers to interrogatories, what did you acquire there?
A. The Eckel Theatre.
Q. That was an operating theatre at the time you acquired it?
A. It was.
Q. At some time you entered into an arrangement with R.K.O. for joint operation of that and some of the R.K.O. theatres?
A. That is right.
Q. Downtown?
A. That is right.
Q. Now, what were those downtown theatres?
A. You mean operated by R.K.O.?
Q. The R.K.O., yes.
A. They had the Keith, the Paramount and the Strand.
Q. What was the first that brought to your attention the [fol. 4111] possibility of this joint operation?
A. Well, while I was in New York I met one of the representatives of R.K.O., Senator Walters, and he was asking me about Syracuse.

Mr. Wright: I object to the conversations between the witness and Senator Walters.
The Court: Was Senator Walters representing R.K.O.?
The Witness: Yes.
The Court: All right.
Mr. McClennen: You have to stop there.

Q. Now, that developed into the joint operation in what proportions?

A. We got 40 per cent and R.K.O. got 60 per cent of the net profits.

Q. Did those percentages continue at that?

A. It continued for five years.

Q. Then was the proportion changed?

A. Yes, sir.

Q. To what?

A. To 30 per cent for us and 70 per cent for R.K.O.

Q. Dealing with those theatres that you have just mentioned, that is the Eckel and these three of R.K.O., under the arrangement you did what in the operation?

Mr. Wright: If the Court please, I assume there is a contract that sets forth who was to do what. If there is, I [fol. 4112] think that would be the best evidence.

The Court: Do you mean by the inquiry who actually operated?

Mr. McClennen: All I want is in the practical operation, specifically, who did the buying and booking for those theatres.

The Witness: R.K.O. did the buying and booking.

By the Court:

Q. Did you say when this year's arrangement was made with R.K.O.?

A. The first arrangement was in 1935, I believe.

Q. Altogether until what time?

A. It was for five years.

Q. You said it was later——

A. Later it was renewed again, but we only got 30 per cent out of it.

Q. That went on for how long?

A. That is still in existence.

By Mr. McClennen:

Q. When the change was made from 40 per cent down to 30 per cent for you, was there any change in the buying and booking?

A. No.

Q. That was still conducted by R.K.O.?

[fol. 4113] A. Yes, sir.

The Court: Did that include the Eckel also?
The Witness: Yes, sir.

Q. Now, after the disposal of the theatres that you made in 1929 and 1930, I direct your attention to Buffalo, Lockport, Geneva, Malone, Massena, Ogdensburg, Rochester and a half interest with the Shea organization in Amsterdam; did you retain any other places?
A. You mean immediately after this disposition?
Q. No, retain——
A. Immediately after we sold?
Q. Immediately.
A. We had two other towns, East Rochester and Fairport, which was disposed of to some other exhibitors at about the same time.
Q. And with that exception did you retain any other than I have mentioned?
A. No.

The Court: You mean by your answer that after this arrangement you had no other theatres?
The Witness: No other theatres.
The Court: I thought in your opening you spoke of several, a number of theatres which he had retained.
Mr. McClennen: These are the ones.
The Court: Aside——
[fol. 4114] Mr. McClennen: No, Buffalo——
The Court: You said aside from those.
Mr. McClennen: Aside from those.
The Court: I did not recall that you included Buffalo in that exception before.

By Mr. McClennen:

Q. To put it less awkwardly than I did, after these disposals, including East Rochester, and so forth, the only places that you retained were in Buffalo, Lockport, Geneva, Malone, Massena, Ogdensburg, Rochester and a half interest in Amsterdam?
A. Right.

Mr. McClennen: Turning now to Bellefontaine I bring to the Court's attention another correction that should be made in my opening. At page 4036 I said at the top, with reference to this new theatre in Bellefontaine, the Holland, which I had described on the preceding page as having been

the site acquired at $27,500, and the expense of building the the theatre above that $196,800, I said at the top of page 4036, "Costing over $120,000". Obviously I should have said "Costing over $220,000".

Now, if your Honor please, with reference to Bellefon-
[fol. 4115] taine, pursuant to your Honor's leave, at page 2327, I should like to put before you the publications in the Bellefontaine newspaper set out at pages 2290 to 2299, which I will read to your Honor. I suggest that the stenographers need not take this down again.

The Court: It is marked as an exhibit?

Mr. McClennen: No, your Honor, it is in the text of the testimony. This was after your Honor adjourned and we took off from the paper what either side wanted.

(Whereupon Mr. McClennen commenced to read the preceding record at page 2290, which was not reported in pursuance to the foregoing instructions.)

[fol. 4116] The Court: What is the population of Bellefontaine?

The Witness: About 10,000.

The Court: What were the theatres, outside of the Strand and the Holland? Does it appear that there are others? Were there other picture shows there?

The Witness: There were two closed theatres.

The Court: Oh, yes, the Opera House——

The Witness: And the Majestic.

Mr. McClennen: The reason that I offered this evidence that I have just read in the effort to have it a part of Mr. Mooney's testimony was because of the flat contradiction between the prices and Mr. Mooney's statement, but it serves its purpose as well put in at this time.

By Mr. McClennen:

Q. Mr. Schine, what first directed your attention to the possibility of going into Bellefontaine?

A. Our manager from Sidney, Ohio,——

Q. In consequence of what he said to you did you receive any communication, or have any conversation with some one else?

A. I had a conversation with one of the citizens of Bellefontaine, who came over to see me in Sidney, Ohio.

[fol. 4117] Q. Do you remember his name?

A. Mr. Peters.

Q. And what did he say to you?

Mr. Wright: That is objected to. I don't see it makes any difference what Mr. Peters said to him at that time.

The Court: Yes.

By Mr. McClennen: I propose to show, if I am permitted to do so, that Mr. Peters and a group of citizens of Bellefontaine came to Mr. Schine and urged upon him the need of a new and proper theatre for Bellefontaine, that this was not at all a projection of himself into the town, but was at invitation from prominent citizens of the town. Now I urge that that is material.

The Court: Of course, in the first place, what was said between them may only be shown, if it is shown at all, and in the next place it seems to me he can show that a delegation came to him with reference to the establishment of the theatre in Bellefontaine.

[fol. 4118] By Mr. McClennen:

Q. Well, is that latter, as his Honor has stated, the fact?

A. Yes.

Mr. Wright: If the Court please, we object.

The Court: I will overrule the objection.

Mr. Wright: It doesn't make any difference whether he was invited in or whether he conceived the idea himself. He went in.

The Court: It may have some bearing.

Q. You acquired the land for your carrying-out of that invitation in 1930?

A. I think it was.

The Court: You say carrying-out of the invitation. There is no proof of any invitation.

The Witness: It was either '29 or '30.

Mr. McClennen: I didn't quite understand.

The Court: You said "carrying-out of the invitation." There is no proof of any invitation. Members of that town came to see him with reference to putting up a theatre, and as the result of that he may state what happened. You used the word "invitation." Of course that raises the point of the objection.

Q. Was this acquisition of this land as a result of the [fol. 4119] call of that deputation upon you?

A. Yes.

Q. It appears from Defendants' Exhibit D-150 that the original cost was $27,500 and that the building and improvement was in addition $196,800. Now, was the theatre to which those figures relate the Holland, which opened on February 12, 1931?

A. Yes.

Q. Will you describe that theatre at that time?

A. This theatre is built of brick and steel and completely fire-proof and is known as atmospheric. It has clouds and stars in the ceiling and, due to its name and the architect, who happened to be Dutch, the design was of Dutch character, with windmills and various other decorations, and seats around 1400 people, with every modern convenience and appointment for public spaces and air-conditioning and cushioned seats with springs in them, and the very latest projection and screen, which gave that town a theatre they were all proud of.

Mr. Wright: If the Court please, that is objected to.

The Court: The latter part of the statement, that it gave them a theatre they were proud of, may go out.

[fol. 4120] By Mr. McClennen:

Q. Come now to Mt. Vernon and 1934. From what source did the idea of your going into Mt. Vernon come to your attention?

A. From the owner of two theatres of Mt. Vernon.

Q. And who was that?

A. Mr. Smoots.

Q. And what *was* the two theatres?

A. One was the Vine which he owned and the Memorial, which he had under lease.

Q. As a result did he meet you somewhere?

A. I met him in Mt. Vernon.

Q. And what conversation did you have with him?

Mr. Wright: That is objected to, if the Court please.

The Court: Sustained. I will let you show that he purchased these theatres.

Q. Did he propose to you that you acquire his theatre and the lease he had of the Memorial?

Mr. Wright: That is also objected to, calling for a conclusion as to what the conversation was.

Mr. McClennen: But it is wholly immaterial——

The Court: I will let him state what the proposal itself was. I will let it stand.

Q. What was Mr. Smoots' proposal?

[fol. 4121] A. He proposed to lease us his Vine Theatre and sell us the lease on the Memorial Theatre.

The Court: How do you spell that name?

The Witness: Smoots, S-m-o-o-t-s.

Q. Now, at about that time did Mr. Platt see you?

A. Yes, sir.

Q. And did Mr. Platt—first, what was Mr. Platt's connection with the theatre business?

A. Mr. Platt operated the Lyric.

Q. And did Mr. Platt propose to you what should be done with respect to that?

A. Yes.

Mr. Wright: That is objected to, if your Honor please.

The Court: That calls for a conclusion.

Mr. Wright: I think he should be confined to saying what he did, not what Mr. Platt did.

The Court: What was done with reference to the theatre?

The Witness: Mr. Platt proposed to sell us the equipment and lease of the Lyric, provided he could get a job to manage the theatres.

Mr. Wright: I move to strike it out. This is just an indirect way of getting in the conversations that were excluded.

The Court: Did Mr. Platt testify?

[fol. 4122] Mr. Wright: No.

Mr. McClennen: No, your Honor.

Mr. Wright: There wasn't any testimony at all with respect to these acquisitions.

The Court: What is that?

Mr. Wright: There was no testimony offered by us with respect to these acquisitions.

The Court: Well, I think it is competent to show that some one came to him and proposed a proposition for the purchase and sale of the property.

Mr. Wright: What difference could it possibly make? If you were going to attempt to judge whether the proposal

did come from him, or had come from Mr. Schine, I suppose it would be necessary to know the entire conversation that occurred. It is always a conclusion as to what happened, assuming it is material.

The Court: That would not be so. It might be entirely separate from anything else, as an offer, but it has a bearing.

Mr. Wright: If it is in writing, I suppose the written offer, if one was made, could be produced and that is the best [fol. 4123] evidence. If it is a conclusion to be drawn from the conversation itself, then it seems to me it is just as objectionable as the conversation itself would have been. There is no occasion, as I see it, to permit this witness to characterize the results of these negotiations as proposals made to him any more than they would be characterized as proposals he made to the man he dealt with. In each case, I suppose it would be eventually that there were proposals back and forth.

The Court: I will let him state what he said on the subject, what he said he would take for the property.

By Mr. McClennen:

Q. What did Mr. Platt say with reference to the sale of the property of the Lyric to you?

Mr. Wright: Just a minute, do I understand your Honor's ruling now to be that he may go into all conversations with respect to acquisitions with respect to which we offered no testimony?

The Court: I will meet that situation when we come to it. [fol. 4124] I confine the ruling to this one thing. Go on and state what he said.

The Witness: He said he would like to sell us the equipment and lease of the Lyric Theatre provided he could get a job to manage the theatres in town.

By Mr. McClennen:

Q. About when did you close your deal with Mr. Platt?

A. Well, it was about a month after we acquired the Smoots theatres.

Q. Well, that would be how early in 1934?

A. I would say it was in February.

The Court: That was in writing, I presume?

The Witness: I beg your pardon?

The Court: That was in writing?
The Witness: Yes, sir.

Q. Subsequently did you have any survey made with respect to improving the Vine or building another theatre?
A. Yes, sir.
Q. And when did you begin on the making of that survey?

The Witness: Yes.
The Court: When?

Q. When?
A. Oh, when, that was—we first made moderate improvements on the Vine, and about a year later we started to make a survey of enlarging the Vine, and making that into a [fol. 4125] modern theatre.

Q. And when did you begin on that survey, that is, how soon after your deal with Mr. Platt which you have placed in February, 1934?
A. Oh, I would say in 1935 we started to make a survey of the Vine Theatre, and we had the architect give us an opinion as to what could be done with it.

Q. What was the location and the description of the three theatres, the Vine, the Memorial and the Lyric? Take first the Vine. Before you had made any changes in it, where was it located and what was its description?
A. The Vine was near the busy part of the square, a little off the main street and the theatre itself was a one-floor theatre seating about 600 people. It had a high ceiling, but lacked in modern appointments and conveniences and the lobby was very short.

Q. Very short?
A. Short, yes, had no depth to it. The Lyric was an old——

Q. Location first.
A. The location was 100 per cent location of the town.
Q. Well, by that you mean it was——
A. The finest location we could get; right on the square and the busy part of the city near the chief department store.

Q. Was that the site on which you subsequently built?
[fol. 4126] A. Yes, sir.
Q. The new Vernon Theatre?
A. Yes, sir.

Q. Describe the Lyric Theatre as it was in the beginning of 1934.

A. The Lyric Theatre was a very narrow building. I should say it was one of the first theatres built for motion pictures; had a high ceiling, but only had one aisle in the center, with about four or five seats on each side. It had no lavatory facilities and had a stove in the rear of the theatre right in the aisle.

Q. You mean a heating stove?

A. Yes, a heating stove, and the booth projected right over part of the audience, and the ceiling of that was low. Is that all you want?

Q. Now, the Memorial, its location and description.

A. The Memorial was out of location.

Mr. Wright: That is objected to. He should state where it is.

Mr. McClennen: Strike out "out of location".

The Court: Tell where it was.

The Witness: The Memorial was on top of a hill, I would say about a block and a half or two blocks from the business section and was a county building.

[fol. 4127] Q. A county building?

A. A county building where they have county offices, and in the entrance you have to walk, I would say, about 100 feet off the sidewalk and the entrance was just an ordinary door. It has no appearance of a theatre. Then you walk into a hall which contains seats, has a balcony and is equipped with a booth and screen. Its seating capacity, however, was larger than either the Vine or the Lyric.

Q. Did the Lyric site, as it was in 1934, and at the time of your survey, furnish enough land for the building of the Vernon which you built on that site later?

A. No.

[fol. 4128] Q. What was necessary in order to get an adequate amount?

A. We had to buy additional land.

Q. Will you describe the New Vernon Theatre when it was completed?

A. The New Vernon Theatre——

Mr. Wright: Can we have the date?

Q. It is suggested you give the date of completion? Have you that in mind?

A. I don't think I have. It was probably in '37. I haven't got the date, I am sorry. Was it '37? I could look up my notes. '37 or '38. It was in '38, April, '38.

Q. Describe the Vernon at its completion in April, 1938?

A. It is a modern, fire-proof constructed theatre with a wide marquee in front, no stores, and it has a large lobby, and in-doors it is decorated in a very modernistic style. It has the finest seats obtainable, as all the other equipment. It has a fine mezzanine, furnished rather attractive, and comfortable, has fine public spaces for men and ladies upstairs and downstairs, and seats around 1300 people.

Q. It appears from Defendants' Exhibit D-150 that in the additions, including improvement of the Vernon, you expended $48,600. Was that substantially all expended in the period from 1934 to the opening in 1938?

A. You mean by us?

[fol. 4129] Q. By you, yes.

A. That was all respent on the building after it was completed.

Q. By that do you mean that the owner of the land spent sums in addition to that?

A. The owner built the building and we equipped it.

Q. So that this was but a part of the cost?

A. Yes.

The Court: The equipment part?

The Witness: Yes.

Q. Do you happen to know approximately how much the owner's expenditure was?

A. You mean besides the land or with the land?

Q. I mean above the land.

A. Above the land, I think they spent $120,000 to $130,000.

Mr. McClennen: I offer in evidence Defendants' Exhibit D-148-A, B, C, D, E, and F for identification.

Mr. Wright: We have no objection.

(Thereupon the Vitagraph contract dated July 13, 1935, paper dated July 13, 1935, paper dated July 13, 1935, and contract approved September 5, 1935, cancellation notice, dated December 11, 1935, and cancellation notice, dated December 11, 1935, previously marked as Defendants' Exhibits D-148-A, B, C, D, E and F, respectively, for identification were received in evidence.)

[fol. 4130] Mr. McClennen: Defendants' Exhibit D-148-A is a Vitagraph contract, dated July 13, 1935, approved by Vitagraph July 23, 1935, with the State-Bucyrus Company, by M. H. Breyer, Secretary.

Defendants' Exhibit D-148-B is a paper dated July 13, 1935, attached to the contract, saying "This is the same deal as last year, except that on the Shorts and 32 features I gave him the privilege of three or four days instead of two or three days. He figures he may go to two changes a week. However, I gave him no assurance New York or you would approve. I tried to get an increase on this but you know the set-up. I also got the 14 de luxe trailers in at $4 instead of $3 and the four pictures at 25%, show a 15% increase. The paying arrangement on figures to start at expiration of present paying arrangement. Regards, F. J. B."

Defendants' Exhibit D-148-C is July 13, 1935. "It is agreed that in consideration of contract signed by Warners, First National and Vitagraph 1935-36 product, Vitagraph, [fol. 4131] Inc., agrees to cancel the Shorts unplayed from season 1934-35. The amount not to exceed $60." That is signed by Vitagraph, Inc., by F. J. Brandt and by the State-Bucyrus Co., by M. H. Breyer.

Defendants' Exhibit D-148-D is a contract for the 60 Warner-First National productions of the 1935-36 seasons, signed by Vitagraph by F. J. Brandt and by the State-Bucyrus Company by M. H. Breyer, Secretary, and approved September 5, 1935.

Defendants' Exhibit D-148-E is the cancellation notice of the First National part of this contract, dated December 11, 1935, by M. A. Mooney, Branch Manager.

Defendants' Exhibit D-148-F is the cancellation notice of the Warner's pictures of this contract and dated December 11, 1935, both "E" and "F" signed by M. A. Mooney, say: "This house was taken over by the Schine Theatrical Co., Inc. Re-submitting new contract signed by Schine's." [fol. 4132] That is in the block on the paper headed, "Reason for cancellation."

The Court: That is Warner's?

Mr. McClennen: That is Warner's in both cases.

The Court: What do you claim for these particular contracts?

Mr. McClennen: To meet Mr. Breyer's testimony. He had evidently forgotten this contract.

Mr. Wright: If the Court please, there is nothing in his testimony at all inconsistent with what has been offered. He testified he signed that application and sent it in. He never got an approved contract. This shows what happened to that application.

Mr. McClennen: I won't go into argument at this time.

The Court: All right.

Mr. McClennen: I submit that Mr. Breyer did not testify in the way just stated and that this is inconsistent with his testimony, and we attribute it to forgetfulness on his part.

By Mr. McClennen:

Q. It has appeared that you acquired the interest of Mr. Charnas at Bucyrus. What was the first thing that came to your attention with reference to that possibility, that resulted in your making that arrangement?

A. You mean with Mr. Charnas?

[fol. 4133] Q. Yes.

A. I met Harry Charnas in New York, a brother of this Charnas, and we had dinner together.

Q. Never mind the dinner, and so forth. He said something to you about this and what did you say?

A. He talked to me about a possibility about buying out his brother.

Q. What did he say?

Mr. Wright: If the Court please, I don't see how it is proper here to go into a conversation that this witness had with a brother of the witness about buying out the other witness's theatre.

The Court: Well, I suppose the question is how he came into the picture there of buying, to show he had a discussion with a brother of the owner about this theatre.

Mr. Wright: I don't understand what it is competent to show. How can that possibly, any more than if he had a conversation with me or your Honor, or any one else, relative to buying that theatre? What relevance has that got to any of the issues that we are trying here?

The Court: It may not be of great materiality but I think [fol. 4134] it is competent to show he met somebody who brought up the subject of this theatre.

Mr. Wright: He might have discussed this theatre with representatives of the exhibitors with Charnas' aunt, his

uncle, his father, twenty other people. If we are going into that field it seems to me there are no limits to the lawsuit.

The Court: It shows how it came about, on the subject of purchase, that is all.

Mr. Wright: Let him ask him, then.

The Court: You met the brother of Mr. Charnas?

The Witness: Yes, and he——

The Court: Never mind, what you said to him. What next happened?

The Witness: We bought him out after we——

The Court: Bought the brother out?

The Witness: Yes, after the price was agreed on.

By Mr. McClennen:

Q. You did not buy out the brother who made the proposal to you?

A. No, we saw his brother.

Q. Was this conversation of Harry Charnas' the first thing that occurred with respect to the purchase that you subsequently made from his brother?

[fol. 4135] A. Yes.

Q. In that conversation did Harry tell you that his brother wanted to sell out?

A. Yes.

Mr. Wright: That is objected to.

The Court: Sustained. I think it sufficiently appears.

Mr. McClennen: I was putting it intentionally leading, to avoid all the extraneous parts.

The Court: You testified that is the first you knew of this matter was the talk with his brother in New York. If you want to show when it was, with reference to the time he bought it——

Mr. McClennen: I beg your Honor's pardon?

The Court: I will let you show when it was with reference to when he bought it.

Q. How long was it before you bought out Mr. Charnas that his brother Harry spoke to you about it?

A. I would say it was several months.

Q. Seven months?

A. Several months.

Q. You pause before answering this question: What did Harry Charnas at that time say to you on the subject matter of a purchase of his brother's interests?

Mr. Wright: Same objection.

[fol. 4136] The Court: Sustained.

Mr. McClennen: I offer, if your Honor please, to show that the witness, if permitted to answer, would say, in substance, that Harry Charnas informed him that his brother wanted to go to another place and wanted to sell out his interest to Mr. Schine so that he could do so.

The Court: Perhaps you may elicit the information from the brother from whom it was purchased.

Mr. Wright: That is precisely the point. The brother from whom the purchase was made, as I recall, testified.

The Court: What is that?

Mr. Wright: Mr. Phil Charnas, from whom the purchase was made, was on the stand here. They had ample opportunity here to cross-examine him.

The Court: The objection is sustained.

Mr. Wright: Instead of asking questions of this kind.

The Court: The objection is sustained to this question.

By Mr. McClennen:

Q. Was it in consequence of the conversation with Harry Charnas that the purchase from his brother was made?

A. Yes.

[fol. 4137] Mr. Wright: That is objected to. That calls for a conclusion as to what factors influenced the purchase. There may have been a very substantial number. I think that is a conclusion that your Honor should draw. He can state what all the circumstances were prior to that purchase and then I think your Honor can make a decision as to whether or not the purchase resulted simply because he had talked to Harry Charnas, or whether there were other factors that entered into the particular purchase.

The Court: What do you mean by "all the circumstances"?

Mr. Wright: Well, the circumstances are, among other things, that that was a theatre there which was operating in competition with one he had, that Schine was then engaged in expansion program in that part of Ohio. He can tell what their activities were at that time when they bought the theatre. That, it seems to me, are the circumstances. He also had conversation with his brother Harry and from those circumstances I suppose your Honor can draw the

[fol. 4138] conclusion as to what, if any, factor made them decide to make the deal.

The Court: This question goes too far, but it looks to me, by reason of the conversation he had with the brother, that he went to that person's brother and as the result purchased the property.

Mr. Wright: That is not what this last question was.

The Court: That is very true. I think that is as far as he can go. I mean as to that. He can inquire whether, by reason of that talk with the brother, he went to the brother's brother and took up the subject of the purchase of the property. Let him answer that.

[fol. 4139] Mr. McClennen: Well, I am not sure that he went himself.

The Court: Or if he sent somebody.

Q. Was it in consequence of this conversation with Harry Charnas?

A. Yes.

Mr. Wright: That is objectionable.

The Court: Oh, no, I will let him answer, by reason of this talk, after this talk, or by reason of this talk about a possible sale of this property he went or sent somebody to the one who told him.

The Witness: Yes, sir.

Q. It appears in Exhibit D-150 that for the Bucyrus Theatre at Bucyrus, you expended for the acquisition $15,500, and for improvement on that of construction $81,500?

A. Yes.

The Court: I suppose it appears what theatres there were in Bucyrus?

Mr. Wright: I think that was testified to by Mr. Breyer and Mr. Charnas.

Q. And from the answers to interrogatories that the land was acquired in August, 1935 and the theatre, the Bucyrus, completed in 1936. Will you describe that theatre after its completion?

A. That theatre is a modern structure, built of brick and [fol. 4140] steel, and has all modern improvements with ample public spaces for men and women. It is air-conditioned and has a lower floor, furnished with fine upholstered

seats, and it also has a balcony. It has two small stores in front and a marquee with a large sign in front of it, and is located in the heart of the city, which I might say is a 100 per cent location, I would call it.

Q. What was the thing that started you on that acquisition?

A. I received a letter from——

Q. And in consequence of that letter did you have any conversation with any one?

Mr. Wright: If the Court please, this entire line of testimony, of calling attention to what started you then, and in consequence of this, did you do that, all calls for a mass of conclusions this witness isn't competent to make, and I think your Honor should make. I think what should be done is to show what the facts and circumstances were, fix the time when certain things occurred prior to the acquisition, what occurred, and as to whether or not any of those things that occurred, or some other facts that occurred, [fol. 4141] were the moving factors, it seems to me should be decided by the Court and not something we should have from this witness.

The Court: Well, if you follow that line I think the question in the present form is incompetent because it really calls for a conclusion as to the contents of letters. I will let you show, as you did before, that he received a letter on a certain date and what he did subsequent to that. It isn't a question that he received a letter that related to the subject of the participation, it speaks for itself, because if it was received you should produce it.

Mr. McClennen: I will proceed to show then what took place without any reference to any letter.

Q. Did a group of citizens of Buycrus call on you?

A. They asked me to call on them.

Q. And about when was this?

A. That was about the early part of 1935.

Q. And what conversation—do you remember the names of any of those gentlemen?

A. I do not.

Mr. Wright: Does it appear this was in the form of an [fol. 4142] oral invitation, or are you getting back to the letter?

The Witness: That was a—the letter was the invitation.

Mr. Wright: It seems to me, if we are going to have that, we ought to have the letter.

By the Court:

Q. Did you answer that you received a letter from them and out of that you met this group?

A. I received a letter to stop in Bucyrus on the next trip, which I did.

The Court: He said he received a letter to stop in Bucyrus on his next trip.

By Mr. McClennen:

Q. When you met these gentlemen will you state the conversation that you had?

Mr. Wright: If the Court please, that is objected to. It doesn't even appear who these gentlemen were, or where and when he met them. Certainly the conversation he had with them would not be material in any event.

The Court: The same situation as before. He may state they came to him and discussed the subject of erecting a theatre, but to go into the question of whether they invited him to build a new building is a question of the conversation [fol. 4143] and would not be competent.

By Mr. McClennen:

Q. Is the fact as put to you by his Honor correct?

A. Yes, sir.

Q. Now, what was the conversation?

A. The conversation was——

Mr. Wright: That is objected to.

The Court: No, you are going a little farther than what I said. What I said was I would let him tell they came to see him on the subject of building a theatre at that place, but not the details of the conversation.

Q. That is the fact, is it?

A. That is the fact.

Q. Did they take you to see an uncompleted theatre in the town?

A. They took me to see an uncompleted theatre in the town.

Q. And did they talk with you on the subject of how that theatre had come to be in that shape?

A. Yes, sir.

Q. And what was the state of completion or incompletion of that theatre at that time as you saw it?

A. The walls were up, and the steel was up, and it had been standing that way for two or three years, and they told me it was an eye sore in town, and they would like to [fol. 4144] see——

Mr. Wright: That is just an effort to get in what is already objected to and ruled out.

The Court: Describe the building.

The Witness: The walls were up and the steel, the girders on the roof, were up and it was standing there.

The Court: Partly, you mean?

The Witness: Partly completed.

The Court: We will suspend for five minutes.

(Short recess.)

By Mr. McClennen:

Q. Was the Bucyrus Theatre that you built put upon the incomplete structure that the deputation from Bucyrus had shown you?

A. We completed the unfinished structure that was standing there.

Q. Now, will you describe the capacity of that theatre?

A. I think I just did describe it.

The Court: What is that?

The Witness: I thought I did describe the Bucyrus Theatre.

The Court: No.

Q. I think you did not state the seating capacity. Do you bear that in mind?

A. It has about a little less than 1300 seats.

[fol. 4145] Q. Come now to Van Wert, Ohio. It appears that you acquired—it appears from the answers to interrogatories that you acquired the Van Wert Theatre or that later the Van Wert Theatre became such in February, 1935. Can you tell me when the architects were put to work on the preparation for that construction?

A. In '34.

Q. Do you remember at what time in '34?

A. I couldn't say the exact time.

Q. Do you remember how long it took to complete the construction of that theatre before February, 1935?

A. I think it took about six or eight months.

Q. Well, that would enable you to state something of how early in 1934?

A. It was the early part of 1934.

The Court: When did you open it?

The Witness: We opened it in February, 1935.

Q. I think, or, do you recall the course of the preparations for the taking of the lease and the preparing for construction of the theatre before the lease was taken, that is, the preliminary investigations?

A. Yes, sir.

Q. And had you obtained the architect's blue-prints before you entered upon the lease?

A. Yes, sir.

[fol. 4146] Q. And you think something like six months before?

A. Something like that, yes, sir.

Q. Come now to Perry in the year 1935.

The Court: Perry, you said?

Mr. McClennen: Perry.

The Court: In 1935?

Mr. McClennen: In 1935.

Q. This has reference to matters preceding the dealings with Mr. Herzberger. Will you mark this for identification?

(Thereupon blue-prints for theatre at Perry, New York, were marked as Defendants' Exhibit D-152 for identification.)

Q. Referring to Exhibit D-152 for identification, a set of blue-prints dated September, 1935, were these blue-prints for a new theatre which you had in contemplation for Perry, New York?

A. Yes, sir.

Mr. McClennen: Will you mark these three for identification as D-152-A, B and C?

(Thereupon specifications for theatre building at Perry, New York, were marked as Defendants' Exhibits D-152-A, D-152-B and D-152-C for identification.)

Q. I show you three sets of specifications for identifica-
[fol. 4147] tion, D-152-A, B and C. Are these the specifications for that same theatre?

A. Yes, sir.

Q. Do you recall, or can you tell by refreshing yourself from these the time fixed for receiving bids for the construction of this theatre?

A. October 4th, 1935.

By the Court:

Q. Did you acquire the land at that time?

A. The land was acquired previously.

Q. To that time?

A. To that time, that was the date set by the architect.

Q. You had acquired land prior to 1935?

A. Yes, we owned land at that time.

Q. Where was that?

A. That was in 1935.

Q. Where?

A. In Perry?

Q. Yes.

A. It was on the main street known as the Davis property. It used to be a garage. A wooden structure was on it. I think it is across from one of the office buildings there.

Q. Near the hotel?

A. No, the hotel, I think, is further up. We are down below a little bit. It is on the corner.

[fol. 4148] Mr. McClennen: Coming now to Paris, Kentucky. Will you mark this for identification?

(Thereupon an ordinance was marked as Defendants' Exhibit D-153 for identification.)

Mr. McClennen: Will you mark this as Defendants' Exhibit D-153-A?

(Thereupon the permit referred to was marked as Defendants' Exhibit D-153-A for identification.)

By Mr. McClennen:

Q. Referring to Defendants' Exhibit D-153-A, dated October 7, 1937, can you tell me when, approximately, you received that permit?

A. Oh, we received it about the early part of October.

Q. In what year?

A. In 1937.

Q. And when did you receive this ordinance, Defendants' Exhibit D-153 for identification? Was it before it or after the time you received the permit of October 7, 1937?

A. Well, it was just before that. About the same time I would say regarding both.

Mr. McClennen: I offer these Exhibits D-153 and D-153-A in evidence.

Mr. Wright: No objection.

[fol. 4149] (Thereupon the ordinance previously marked as Defendants' Exhibit D-153 for identification was received in evidence.)

(Thereupon the permit previously marked as Defendants' Exhibit D-153-A for identification was received in evidence.)

Mr. McClennen: This Defendants' Exhibit D-153 is an ordinance of the Council of Paris, Kentucky, setting out the authorization of a permit to the Phoenix Amusement Company for the erection, maintenance and operation of a motion picture theatre on the lot in Paris, Kentucky, described in it, and Defendants' Exhibit 153-A is the permit to——

The Court: You referred to it as an ordinance.

Mr. McClennen: The first was an ordinance for a permit.

The Court: All right.

Mr. McClennen: Defendants' Exhibit D-153-A is entitled: "Permit to Phoenix Amusement Company for erection, maintenance and operation of a theatre in the city of Paris, Kentucky," and starts out with the words "Pursuant to ordinance No. A." And ordinance No. A is Defendants' Exhibit D-153, and the permit is dated October 7, 1937.

Q. Did you proceed to have planned the theatre to be con-
[fol. 4150] structed pursuant to that ordinance?

A. Yes.

Q. And do you remember when you got bids for its construction?

A. We first got bids in '37.

Q. What time in '37?

A. About the middle of the summer, I think.

Q. I attract your attention to the fact that the ordinance is dated October 7, 1937.

A. Yes, but it took some time to draw the plans and get the things ready, and then we sent it out to the contractors. It was probably the early part of the spring or summer.

Q. Of what year?

A. Of '38, I think it was.

Q. You were inadvertent in saying '37 earlier?

A. Yes.

The Court: Was the building completed in '38?

The Witness: The building was not completed in '38. It was completed in about '40, I believe.

The Court: '40?

The Witness: Yes. In 1939 it was completed; I beg your pardon.

Q. Mr. Schine, for the acquisition of theatres have you personally made any threats or misrepresentations?

A. No.

[fol. 4151] Mr. Wright: Just a minute. If the Court please, that question is objected to. He is entitled to say what he did and what he said to people, and that, I take it, is for your Honor to conclude whether what was done and said constitutes a threat, or anything of that sort; not competent for him to state.

Mr. McClennen: This, if your Honor please, is not what he did. It is what he did not do. He cannot describe it in any way.

The Court: Testimony on the part of the Government here with reference to acts by the defendant or his associates. Of course, the testimony is what was said.

Mr. Wright: The testimony as to what was said or done. If there is anything any witness testified to what was said or done that he thinks is wrong he should so state. That is the way the testimony should be given. It isn't proper to have him say he never made any threats or never did acts from which your Honor might conclude was the threat or not the threat. It is something for him not to say.

Mr. McClennen: I submit that when in a bill of complaint [fol. 4152] in equity a man is charged with making threats

or misrepresentations that he is in a position where he is entitled to show that he did not do anything of the kind, even if no evidence has been introduced, and of course you can't go in any way to this point except by the straight negative if he did nothing of the kind. If he did something then is the time for a statement of the conversation, or what not, but if he did not do anything of the kind there is no conversation to be stated.

The Court: Of course the word "threats" itself is a conclusion. An act. I would think it would be sufficient on the part of the defendant if it meets the issue to direct the inquiry to the particular individuals who have testified with reference to acts directed to show threats.

Mr. McClennen: If your Honor please, no witness has testified to any threats by Mr. Schine.

The Court: I know, but they testified he did so-and-so.

Mr. McClennen: They have not testified to anything of that sort so far as Mr. Schine is concerned.

[fol. 4153] The Court: Well, if that is true why is it incumbent upon the defendant to deny it?

Mr. McClennen: I think it is not incumbent upon the defendant, but advisable that the defendant should do so, when he stands charged by a solemn complaint on the files of the Court with having done such a thing.

The Court: Well, there is some testimony that indicates, from which the conclusion might be drawn, that certain things were threatened to be done if certain other things were not done.

Mr. McClennen: I urge upon your Honor by Mr. Schine personally, and that is this question. He is personally a defendant.

The Court: We will recess now until 2 o'clock.

(Whereupon a recess was taken until 2 o'clock P. M.)

[fol. 4154] After recess, 2 o'clock P. M.

Appearances: As before noted.

(Thereupon photostatic copy of excerpt from Telegraph-Forum, Bucyrus, Ohio, Friday, September 6, 1935, marked as Defendants' Exhibit D-154 for identification.)

Mr. McClennen: If your Honor please, I asked to have marked as Defendants' Exhibit D-154 for identification a photostat of the Telegraph-Forum, Bucyrus, Ohio, Friday, September 6, 1935.

The Court: Is that marked?

Mr. McClennen: It is marked for identification.

The Court: What is it marked?

Mr. McClennen: As D-154.

I, this morning, put in evidence as D-148-D a contract with the State Bucyrus Company by M. H. Breyer, Secretary, approved by Vitagraph September 5, 1935. On that contract, amongst others, is the Warner Production No. 905. The Warner release schedule, Exhibit 645 shows that No. 905, released September 7th, 1935, was the picture "Page [fol. 4155] Miss Glory" with Marion Davies heading the cast.

The reason for offering the Exhibit 154 is that it advertises Marion Davies——

Mr. Wright: Just a minute. There isn't any proof at all that this so-called ad here actually appeared as an ad. He has a photostat there that he says is a copy of the paper which we have had no opportunity to check, and if Breyer were here I suppose he could check all of this, which is now being offered long after Breyer has left the stand and after we have been deprived of the opportunity of asking Breyer what he knows about this material that is now being offered, with nothing more than counsel's statement as to what it is and what it contains.

Mr. McClennen: As I was saying, in describing the offer, it is an advertisement of Marion Davies in "Page Miss Glory," three days, starting Sunday. Sunday following September 6th, 1935 was September 8th, 1935, one day after "Page Miss Glory" was released, according to the Warner schedule, Exhibit No. 645.

[fol. 4156] I offer this.

The Court: What significance has that particular showing?

Mr. McClennen: Because of the argument this morning with reference to this contract with Mr. Breyer, dated in approval September 5th, 1935, that this is an advertisement by the State Theatre, Mr. Breyer's theater, that that picture was coming on Sunday, September 8th, bearing out, we submit, the furnishing of that picture to Mr. Breyer pursuant to the approved contract.

The Court: Well, what is the evidence to the contrary? What is the evidence of Mr. Breyer with reference to that?

Mr. McClennen: The evidence of Mr. Breyer was that he did not have the Warner contract.

The Court: This is Warner?

Mr. McClennen: This is to meet that.

The Court: What is this exhibit here? This was a Warner production, did you say?

Mr. McClennen: The Exhibit No. 645 already in evidence shows that this was a Warner production number 905, released September 7th, 1935, and this advertisement is to [fol. 4157] show its play by Mr. Breyer's theatre on September 8th.

The Court: The point of counsel is there is no basis for the reception of the photostatic copy, no foundation has been laid.

Mr. McClennen: I recognize the fact that they have nothing but our assurance that this is a photostatic copy. Photostatic copies have been received in the past. I urge that this be received.

Mr. Wright: If the Court please, I think your Honor ought to understand the state of the record here and the purpose for which this offer is apparently made. Mr. Breyer, while on the stand, testified that he made this application for Warner product for the 1935-36 season; that he never got an approved contract back and that he didn't get the product. We put in evidence and there is in evidence, in addition to his contract, the contract which was made between Warner and Schine for the 1935-36 season, which is, I believe, Exhibit No. 62, which showed that the contract with Schine for that season's product was ap- [fol. 4158] proved on July 25th, 1935, and it also appears in this contract that production No. 905 was omitted from the deal that was made with Schine.

Now, if this had been brought up, this attempted impeachment, suggested impeachment had been brought up while Breyer was here on the stand, the facts could have been developed as to how that one particular picture happened to play, if it played, but there is certainly no way in which that can be determined at this time, simply by offering a piece of paper here which shows he advertised that one picture, assuming that he did advertise and play it. There is nothing in that fact to contradict the story that he gave from the witness-stand to the effect that he sent in his application, did not get an approved copy back and did not get the 1935-1936 pictures which this exhibit 62 shows

were sold to Schine on a contract that was approved prior to the time of approval stated on this contract that is in evidence here as D-148-D.

[fol. 4159] The Court: You claim it is not properly proved and that they have no effective proof?

Mr. Wright: That is right.

The Court: On the first objection I would have to rule with you.

Mr. McClennen: That is on the ground that we have not proved that this is a photostatic copy of the newspaper?

The Court: Well, yes.

Mr. Wright: Assuming it to be a photostat, the time to have offered it was while Breyer was on the stand so we could have asked what the circumstances were, how he happened to get that particular picture.

The Court: No, I do not sustain on that ground.

Mr. McClennen: Before I go to the next offer I will ask to have it marked for identification with the next number, and the reply attached with an "A" of that number.

(Thereupon the two letters referred to were marked Defendants' Exhibit 155 and 155-A for identification.)

Mr. McClennen: I offer the exhibit for identification, D-155 and D-155-A in evidence.

Mr. Wright: There is no question but what these letters [fol. 4160] were written and sent, but what they offer to prove is beyond me.

Mr. McClennen: I understand that that is my Brother's objection to their being received in evidence.

Mr. Wright: Yes, indeed, and I would like to know what the purpose of the offer was.

Mr. McClennen: The purpose of the offer was to show that the representatives of the Department of Justice were apprised of the fact before ever Mr. Breyer was put on the stand that this contract that I have put in this morning was in existence and that there is no surprise and that the reason why the objection that this is a photostat and not the original is pressed at this time is the purpose.

Mr. Wright: There is no claim of surprise at the introduction of these contracts. The only claim that was given was that the photostat of the newspaper ad should have been brought to Breyer's attention at the time he was on the stand, so that he could have given the facts, whatever

they were, with respect to the advertising or playing of that one particular picture which appears in the ad. [fol. 4161] Mr. McClennen: Pardon me. There was also another objection that this was a photostat and not the original, which was the objection that prevented my presenting the merits of the question.

Mr. Wright: You are quite right.

The Court. This letter does not refer to this particular play at all as a particular number?

Mr. McClennen: It refers to this contract, if your Honor please.

The Court: Yes, it refers to this contract, that is true. I don't think it is material. Of course, if you have made the proof in the regular way and shown the publication of this. Do you claim that is taken from the public newspaper?

Mr. McClennen: This is a photostat made last summer at their request, after Mr. Breyer had testified and left the stand, not known to us while he was on the stand, of this periodical.

The Court: Where do you claim it appeared?

Mr. McClennen: It appeared in The Telegraph-Forum [fol. 4162] of Bucyrus, Ohio, in the issue of Friday, September 6, 1935.

The Court: Well, I don't see any reason why the defendant should not be permitted to show the publication of this article.

Mr. Wright: Well, if the Court please, assuming that Breyer advertised on September 6th this picture, there isn't any claim on what is in evidence here that Schine bought that picture away from him. That picture is excluded from the contract which is in evidence, which Schine bought for the 1935-36 season.

The Court: Well, your argument is it is immaterial?

Mr. Wright: Yes.

The Court: Objection overruled. I ruled before it is not the best evidence.

Mr. Wright: Well, it certainly is not any evidence, if the purpose of it is to show that he played the picture. I don't know what the facts are with respect to actual play of the picture. For all I know, it may have been pulled before it was played. All this means is, if this sort of thing goes into evidence at this time, that we have to get hold of Breyer on

some fact that it seems to me is inconsequential in any event, [fol. 4163] and then opens up additional possible rebuttal. This should have been, if it was thought to be of any real importance, it should have been covered at the time Breyer was on the stand. That is my point.

The Court: Counsel just stated he obtained this photostat after the time Breyer testified.

Mr. Wright: In what way does it impeach Breyer's testimony?

The Court: I don't know that it does. You claim that it does not. If it does not, it doesn't do any harm.

Mr. Wright: It just clutters up the record and gives Counsel an opportunity for making an argument based on inferences, when we had a witness here who could have stated the facts had they been inquired into.

The Court: It is not sufficiently proved anyway, so I will sustain the objection at this time.

Mr. McClennen: I understand your Honor's ruling was, so far as materiality is concerned——

The Court: Not the best evidence.

Mr. McClennen: Yes. But I don't want to get the custodian of this newspaper here, if it is going to be excluded when that comes in.

The Court: No, I shall receive it.

[fol. 4164] Mr. Wright: You won't have to get the custodian of the newspaper here. We do want a reasonable opportunity to find out what the circumstances were about that particular ad. It will not be necessary.

Mr. McClennen: On the question if it was in the newspaper.

Mr. Wright: If you will give us a copy of it we will be glad to send it to Mr. Breyer and find out what the facts are.

Mr. McClennen: You will send it to the newspaper, I take it?

Mr. Wright: I assume Mr. Breyer would know whether he saw it in the newspaper at that time or not, or whether he made such an ad in the newspaper, and whether or not the picture was played. Those are all things we would want to know about.

Mr. McClennen: This question, as far as using the photostat is concerned, would it not satisfy you if we secured

the certificate of the newspaper that this is a photostatic copy?

Mr. Wright: Surely. No question about that.

The Court: And you can send it to Breyer and see what his intention was.

Mr. McClennen: The statement of Mr. Breyer, to which I direct attention in this, is on page 1035 of testimony [fol. 4165] before your Honor, where the question is: "Did you ever get Warner's product for the 1935-'36 season?

A. I did not."

We do not charge Mr. Breyer with intentional falsehood in that. We wish to prove that he made a mistake.

The Court: The omission in this one picture?

Mr. McClennen: The omission in stating he did not get Warner product.

The Court: The omission states the one particular product, you mean?

Mr. McClennen: Any Warner product of that season.

The Court: That is true. You claim he only got one, don't you, one Warner product?

Mr. McClennen: I cannot, at the moment, assert how many he got. I don't know. I am asserting that he got the contract approved September 5, and played the next day, and that the exhibits in evidence in this 135 series show the cancellation later of this contract and the submission of the Schine contract, which I infer was dated in accordance with the original contract, and that that accounts for that date. I have nothing in support of that assertion [fol. 4166] except what appears on the face of the papers.

The Court: Well, we come back to what I had in mind. What your contention is, I understand here, is, so far as you have been able to establish, there is one of these pictures he did actually play included in the contract with Warner. The only one this advertisment purports to show is the one in the public ad, the showing of one picture?

Mr. McClennen: This particular publication shows the showing of one of these pictures and we argue from that, inferentially, that he got this contract.

The Court: I understand that.

Mr. McClennen: That had been approved for the whole line of 1935-36 Warner and First National productions.

The Court: All right.

J. Myer Schine resumed the stand in behalf of the Defendants, having been previously sworn, was examined and testified further as follows:

Direct examination (Continued).

[fol. 4167] By Mr. McClennen:

Q. Mr. Schine, returning from Bucyrus to Bellefontaine, I show you a copy of Plaintiff's Exhibit 170, a letter of October 21, 1932, from Mr. Sichelman to yourself, and I direct your attention to the fourth paragraph of that letter and I ask you whether Mr. Granger, on or prior to October 21, 1932, promised that Fox would not sell any one in Bellefontaine? Read the letter before you answer the question.

The Court: Let me see: Who do you claim Mr. Granger is?

Mr. McClennen: This is Mr. James R. Granger, then of Fox.

The Court: A Manager?

Mr. McClennen: A Manager. And this letter was in the group that your Honor admitted over our objection at the end of the plaintiff's case.

The Court: Purporting to be from Mr. Granger?

Mr. McClennen: To Mr. Sichelman from Mr. Granger, and it contains a statement——

The Court: Mr. Sichelman is who?

Mr. McClennen: Mr. Schelman was Mr. Granger's assistant.

The Witness: I take it the name instead of Schwartz is Smertz; isn't it?

Mr. McClennen:

Q. Well, my question to you is: Did Mr. James R. Granger, on or prior to October 21, 1932, promise you that Fox would not sell any one in Bellefontaine?

A. No.

[fol. 4168] Q. Did you in any conversation with Mr. Schmerz inform Mr. Schmerz that Mr. Granger had made such a promise?

A. No.

Mr. Wright: Can I see the exhibit, please?

Mr. McClennen: Just a moment, I can give you a copy.

Mr. Wright: Oh.

Q. Mr. Schine, did you, in the course of negotiations for the acquisition of any theatre, at any time say to the prospective seller that if he did not sell to you he would have difficulty in getting product for his theatre?

A. I did not.

Q. Did you say to any such person that if he did not sell to you you would open up another theatre?

A. No.

Q. In the town?

A. No.

Q. Have you told any one else to make any such statements in negotiating for theatres for you?

A. No, sir.

Q. Were you at the time of any such negotiations aware that any one had made any such statements?

A. I was not.

Q. Have you in any way approved of the making of any such statements?

[fol. 4169] A. I have not.

Mr. Wright: That is objected to, calling for a conclusion.

The Court: Sustained.

Mr. Wright: That is a matter for the Judge, what happened, what he did.

The Court: State if he has ever done anything in connection with any such statement.

Q. Have you said to anyone that you approved of their making or having made any such statements?

A. I never did so.

Q. Have you had any conversation with any employee of Columbia, Fox, Loew's, Paramount, R.K.O., United Artists, Universal and Vitagraph, that any one of them should not deal with a competing exhibitor to you?

A. No, sir.

Mr. Wright: If the Court please, that calls for a conclusion, based on the series of unspecified conversations on unspecified subjects. What is the net conclusion to be drawn from all these negotiations he may have had with these people is something, I suppose, that could only be drawn from a consideration of what was actually said and

what the circumstances were under which these conversa-
[fol. 4170] tions occurred.

Mr. McClennen: These are very specific conversations that I am asking him about, namely, the conversations that never occurred.

The Court: Just read the whole question.

(Question read.)

The Court: Overruled.

Q. Have you written any such statement to any of them?

A. No.

Q. Have you said to anyone of them that if they made such a sale you would not buy from them elsewhere in your circuit?

A. No, sir.

Mr. McClennen: That concludes the direct examination.

Cross-examination.

By Mr. Wright:

Q. Mr. Schine, the figures on this Exhibit D-150, that first column showing the town, next column the theatre, then the column "Cost of Land and Building Acquired", does that cost in that column represent the cost of the land on which the particular theatre named there was located was acquired?

A. That cost represents the land and/or land and building.

Q. Well, in every case is it the land on which the theatre [fol. 4171] was erected or does it include other land?

A. Well, it includes the land on which the building was erected plus the building itself, if we bought a building already erected.

Q. And does it include whatever land you might have acquired in connection with that theatre even though you did not erect a theatre on it?

A. Well, in specific cases it probably—on this list there is no such an item.

Q. Well, how about the Auburn Theatre there at Auburn, that $83,500, does that represent the cost of the land on which the Auburn Theatre stands?

A. On the Auburn land, no, that does not represent the

land alone, but it represents the land as originally bought plus the carrying charge of the land.

Q. What do you mean by the carrying charge of the land?

A. Well, taxes, interest and insurance.

Q. And does it include other land that was bought in Auburn on which a theatre wasn't built?

A. Yes, for exit purposes.

Q. Does it include the church property you bought there?

A. That is the church property.

The Court: What is the church property?

The Witness: On which the theatre is built.

Q. And that property was bought when?

[fol. 4172] A. In 1926, I believe.

Q. Do you remember when it was bought with reference to the time that you got the Palace from Schwartzwolder?

A. Yes, sir.

Q. How long before was it?

A. At about the same time.

Q. Was it before or afterwards?

A. It was just before.

Q. And at that time there was nothing on the property but an abandoned church?

A. A church, yes, sir.

Q. And you didn't buy that property, then, did you, for the purpose of conducting any services there?

A. No.

Q. Then after that you said it was when you made the deal with Schwartzwolder for the Palace?

A. Yes.

Q. Now, on these items that you have got listed here as leased properties, what does that figure that is included under the heading, that is stated under the heading "Additions and Improvements" cover?

A. Well, that means putting in extra equipment and decorating and making such improvements as we thought would be necessary.

Q. Does that include the cost of the leases?

[fol. 4173] A. Well, it wouldn't because the leases would be written down by that time. This was gotten up recently.

Q. Well, do you know whether it includes or not what was paid for a particular lease in the cases where you paid something for a lease?

A. It does not.

Q. Are you sure of that?

A. Well, I can see by the figure this cost us a great deal more than that. The lease cost us a great deal——

Mr. McClennen: Mr. Schine, we are all interested in what you say.

Q. Calling your attention again to Auburn, the Palace Theatre doesn't appear on the list at all, does it?

A. In there (indicating).

Q. It is there, yes. The item $14,500, you say that doesn't include what, if anything, was paid to Mr. Schwartzwolder for his lease?

A. No.

Q. That consists of what?

A. This consists of improvements made on the Palace Theatre.

Q. What improvements?

A. Well, we put in new seats and decorated it and fixed up the ladies' and men's room.

Q. When was that?

Mr. McClennen: Mr. Schine, it is difficult for the Court [fol. 4174] to hear and for us to hear.

The Witness: Pardon me. That was after we acquired the Palace.

Q. You don't remember when, though?

A. Well, this would be in 1926, I would say.

Q. Well, do you know?

A. Yes, sir.

Q. That was what you spent in 1926 in remodeling that theatre?

A. Yes, sir.

Q. And nothing has been spent since then, is that right?

A. Well, it is possible that instead of $14,500 it may be a little less and after that we would have mostly maintenance.

Q. Well, you have your maintenance expense in that figure there?

A. Well, by maintenance I don't mean taking care of it, I mean by retouching, redecorating, something like that, but we haven't done very much with it since.

Q. Items of that kind are all included under the heading "Additions and Improvements?"

A. No, this was the basic cost.

Q. Well, then, there was nothing, that column doesn't represent anything done by way of additions and improvements since you got the Palace from Schwartzwolder, is [fol. 4175] that right?

A. No, it does not.

Q. And where a theatre doesn't appear on the list at all, that means nothing was spent with respect to the additions or improvements as to that particular theatre?

Mr. McClennen: That is objected to, because it leaves out of consideration those theatres that were bought and disposed of and so are not any longer on the list.

Mr. Wright: I am trying to find out what is on and what isn't on.

The Court: He can explain that.

The Witness: What was the question, please?

(Question read.)

The Witness: I wouldn't know that, if they omitted to list the theatre then, of course, it just wouldn't be on the list.

Q. What is that list supposed to represent?

A. This list was taken off our books and represents exactly as stated on the top of the column.

Q. Well, is that supposed to include whatever your books show by way of additions and improvements or original expenditures on all of the theatres that you now have under lease or ownership?

A. Unless—these were taken off the books.

[fol. 4176] The Court: The books were present, and it refers to your present holdings, is that it?

The Witness: Yes.

Q. All of them, is that right?

A. Unless some theatres were omitted—I don't know.

Q. Who prepared the data?

A. Our auditing department.

Q. They would know, wouldn't they?

A. I assume they would, yes.

Q. Now, who was it in your auditing department that prepared this, do you know?

A. Miss Thompson.

Q. Well, actually, she would be in a better position to give testimony here as to what is in and what not in that list, and what it covers than you would, wouldn't she?

Mr. McClennen: That is objected to. A witness isn't called upon to conclude whether she is a better witness than he is or not.

The Court: Ask him if he knows personally about these expenses and expenditures.

The Witness: I requested such a list and this was submitted to me.

Q. All you know is that is what you got?

A. Yes.

Q. Now, as to these acquisitions, this—or, this first [fol. 4177] column here on your own theatres "Cost of Land and Building Acquired", in each instance that may or may not represent an expenditure by one or more of your companies, isn't that right?

A. I don't quite understand the question.

Mr. Wright: Would you read it?

(Question read.)

The Witness: That is right.

Q. And in many instances it represents amounts that were invested by somebody else before you ever took over the property, isn't that right?

A. You mean in this column?

Q. Yes.

A. No, this represents only what we put in the properties.

Q. Well, then, your former answer was incorrect.

Mr. McClennen: That is objected to, that comment is objected to.

Q. This column then represents what you paid for the property?

A. Yes, sir.

Q. And in the case where you bought a corporation which happened to own the theatre that you acquired——

A. Yes, sir.

Q. These figures represent what you paid for the cost or what you paid for the stock in the corporation?

[fol. 4178] A. That is right.

Q. And that may or may not represent the amount of money that went into any particular theatre, is that right?

A. That represents the amount we paid.

Q. And I say you are not in a position to say what, if any relation the amount you paid for the stock of a particular theatre holding corporation has to what the investment was in any one of those theatres, is that right?

The Court: If the company whose stock was bought owned more than one theatre——

Mr. Wright: Perhaps I can make it clear this way:

Q. The figures that you have recorded here are simply the amounts that you paid, that is, when you bought a corporation that owned a theatre, for the stock interest in the corporation that you acquired, is that right?

Mr. McClennen: You are now referring to that first column?

Mr. Wright: Yes.

The Witness: That is right.

Q. And those figures, the relation between those figures and what that corporation or somebody else may have actually put into the property is something you are not in a position to state at this time, is that correct, something that isn't disclosed by that list?

A. That is correct.

Q. Now, those amounts that were expended, you didn't [fol. 4179] mean to have the Court understand, when you referred in your direct testimony, in saying you had spent this money, that any of it represented a personal investment on your part, did you?

Mr. McClennen: That is objected to. What he meant to have the Court understand or infer is not for the witness to say. What he said is important.

The Court: Ask him if he understood he was testifying to that effect.

Q. Is it your testimony, Mr. Schine, that these amounts that are listed on Defendants' Exhibit D-150 were expended personally by you?

A. No.

Q. None of them were, were they?

A. No.

Q. And the money that was put in was furnished by various corporations in which you had some interest, is that right?

A. Yes, sir.

Q. In some cases, and in other cases it was borrowed?

A. Well, we spent the money.

Q. I understand the money was spent. I am talking about the source. There is nothing here to show how much was borrowed or how much came out of the——

[fol. 4180] A. That is right.

Q. —company itself. And it all come out of the pockets of the people who patronized your theatres eventually, didn't it?

Mr. McClennen: That is objected to.

The Court: I don't see how it makes any difference.

Mr. Wright: I understood the purpose of these elaborate figures here was to show that Mr. Schine had made some special contribution of some $6,000,000 to the welfare of the motion picture industry.

The Court: I suppose the corporation did probably expend its money for a certain purpose. That purpose would be—the money was to be derived through industry. It is not claimed he did this personally, that his company purchased or obtained these theatres.

By Mr. Wright:

Q. And all the money——

Mr. McClennen: Just a moment before you go on with the question. The purpose was the one that we stated.

The Court: What?

Mr. McClennen: The purpose was the one that we stated, that the improvements in theatres and building of theatres [fol. 4181] above the original cost had in the case of owned property amounted to $3,506,600, that was the purpose.

The Court: I think it was actually paid out of the company.

Mr. Wright: He hasn't answered that.

The Court: The answer is it was paid out of the company.

By Mr. Wright:

Q. And all the money paid by these companies came from the motion picture operations of those companies, is that right?

A. Part of it came from stockholders that we sold the stock to.

Q. Other than that?

A. Other than that it was from the company.

Q. And those companies were all companies engaged in the motion picture theatre operation?

A. Yes, sir.

Q. It was their source of income?

A. Motion picture operation or real estate.

Q. Real estate operated incidentally or in connection with the operation of theatres?

A. Yes, sir.

Q. Have you got any non-theatre investments in there?

A. Not here, but we have real estate that are not theatres.

[fol. 4182] Q. Did you ever see the answers to the interrogatories that were filed in this case by and on behalf of your companies?

A. No.

Q. I want to call your attention to the fact that you stated in response, the defendant stated in response to interrogatory No. 19, as to theatres built by the Schine defendants, that the cost of construction, including land, building and equipment of the Auburn Theatre was $242,716.88. Do you recall seeing that figure before?

A. You mean this figure here? $245,000 is given here. (Referring to exhibit.)

[fol. 4183] Q. I was calling your attention to the figure that you supplied in answer to interrogatories. It was $250,859 cost for construction, including land, building and equipment.

A. Well, this is the——.

Q. I also call your attention to the figures on your Exhibit 150 here, which show the cost of the land as $83,500 and the cost of the building and improvements since acquisition, $245,000.

A. Well, I don't know what the interrogatories are, but these are the statements given to me by our auditing department.

Q. When did you say that that theatre was finished?

A. It was finished, I believe, in '38.

Q. Have you made any major improvements in it since '38?

A. Well, we add on now and then.

Q. I say have you made any major improvements in the Auburn since then?

A. Yes.

Q. How much have you spent on improvements?

A. I haven't the figures here, except this list.

Q. Well, have you figures that would show? You know you haven't spent more than a few thousand dollars in that respect, don't you?

A. Well, I don't think we spent a lot of money. We [fol. 4184] installed a number of items that cost a few thousand dollars.

Q. Well, is there any way that you can, as you sit there, reconcile the discrepancy between the total of $320,000 that is shown as the investment there and $242,000 figure that was furnished in the answer to the interrogatory?

Mr. McClennen: That is objected to as assuming that there is a discrepancy, when it is obvious from the face of the papers that there is no such discrepancy. One was the cost of the acquisition of land and such building as was on it, to which is added the cost of a new building and improvement. The other shows land and new building, if it was a new building.

The Court: Without equipment, you mean?

Mr. McClennen: No, with equipment also.

The Court: I don't see the distinction you make then.

Mr. McClennen: Well, let me illustrate what I mean. If they bought an existing piece of property for $83,000 and demolished a building, leaving only the vacant land with, we will say, $27,000, I am imagining that, if the cost of the land, then added to that the cost of the new building, [fol. 4185] appears in the answer to the interrogatory. The two things are not stating the same thing.

The Court: I suppose there are times it will show the both things, the total cost, and of course the total cost would include the building that was demolished, in addition to the land. It would include the valuation of $83,000.

Mr. McClennen: If your Honor please, the interrogatory——

The Court: I don't know how these headings are described.

The Witness: The headings, your Honor,—— (Handing papers to the Court.)

Mr. McClennen: The interrogatory asks a different question than the one covered.

The Court: It says, "Cost of land and building acquired". The next is, "Cost of new building and improvement". It would make a total in that case of $255,000.

Mr. McClennen: Yes. If your Honor please, if what is asked in the interrogatory for the cost of the land and the new building put upon it, it is a different thing from the original investment than has been shown to be stock in the corporation, owning the property.

The Court: Building and land, they both are real estate, [fol. 4186] I suppose. I don't know. In Auburn, cost of land and building, $83,500, cost of building and improvements since acquisition, that means cost of land and building would be $38,000. How does your interrogatory read?

Mr. Wright: The interrogatory answer reads: "Cost of construction, including land, building and equipment, $242,716.88".

The Court: If it included building in that land the total would be the same. That figure is $242,000.

Mr. McClennen: If your Honor please, this original cost in Exhibit D-150 in that column would include the land and the church upon it.

The Court: It says so at the top, "Land and building".

Mr. McClennen: The church burned down, and in the answer to the interrogatory they did not include what they had paid for the burned church. That included what they had paid for the vacant land, plus the building they put on.

The Court: As I said before, it is a question of whether they can include the real estate in both. Read that caption again, Mr. Wright.

Mr. Wright: The answer states, "Cost of construction, [fol. 4187] including land, building and equipment, $242,716.88.

The Court: All right.

Mr. McClennen: That is briefly put. That answer does not include the church burned down.

The Court: Whether it does or does not, it might and it might not.

Mr. McClennen: I was making my comment because of the assertion there was an inconsistency between the two figures, assuming there was no such inconsistency.

The Court: Ordinarily, if you are buying two pieces of land, buying that property and land, including it as part of the land, you speak of it as the land.

Mr. Wright: Let me see if I can find out from the witness what actually occurred.

By Mr. Wright:

Q. This $83,500 item is that what you paid for that land that the old church was on at the time you acquired it before you got the Palace from Schwartzwolder?

A. No.

Q. What did you pay for that?

A. I can't tell you, but this figure appears high and I shall be glad to call up and get the information you want.

Q. I don't want the information. I want to know what [fol. 4188] you know about the figures on the list.

A. I am not in position to tell you now but I shall be glad to find out for you.

Q. You don't know what you paid for the property with the church on it at the time you bought it?

A. No, I don't recall it.

Q. And that property just stood idle there until 1938, didn't it? You did nothing with that?

A. No.

Q. The building on there was virtually worthless, was it not?

A. Well, it was not worthless.

Q. Well, was it used for anything?

A. No.

Q. Just stood there?

A. Stood there.

Q. And then the building burned down?

A. That is right.

Q. In '38?

A. No, it was a little earlier than that, I believe.

Q. Can you recall whether you collected insurance on the building?

A. Yes, we collected some insurance.

Q. Do you know how much?

A. I do not recall.

Q. Was that deducted from the cost of what you paid there?

[fol. 4189] A. I cannot say by these figures, but I will have it in the morning for you.

Q. If somebody wanted to know what the actual cost of that land on which the Auburn Theatre is built, and the building, your figure of $242,000 that you furnished in the interrogatory would be about right, wouldn't it?

A. I wouldn't know that at this time. I will know it in the morning though.

Q. Calling your attention to this item on the Colonia Theatre at Norwich: You say cost of land and building acquired, $80,700. That theatre was acquired, was it not, from the corporation?

A. Yes.

Q. You did not buy any land and buildings. What you bought was stock in a corporation? You bought a controlling interest, didn't you?

A. That is right.

Q. Now, is $80,700 what you paid for the controlling interest in that corporation?

A. For all of it.

Q. All of what?

A. All of the stock, assets.

Q. All of the stock that you bought?

A. Yes.

Q. You don't know how much you paid for the control?

[fol. 4190] A. I do not know.

Mr. McClennen: Mr. Schine, continue to remember that you are testifying chiefly for the Court to hear and not Mr. Wright.

The Witness: All right.

The Court: I can hear him. Maybe you can't.

The Witness: Mr. Wright is so close.

The Court: How large a place is Norwich?

The Witness: Norwich is 8,000.

By Mr. Wright:

Q. As far as any figures on this paper, Defendants' Exhibit D-150, are concerned they do not show what the Colonia Theatre, land and theatre building, actually cost, do they, to construct?

A. The Colonia cost much more than is indicated in this column.

Q. Just answer the question.

Mr. Wright: Will you repeat that?

(Last question read.)

A. No.

Q. Do you have records, Mr. Schine, which show the actual construction costs?

A. No.

Q. Those improvements you have there for the Colonia, that shows $29,500, and those represent improvements made [fol. 4191] on the Colonia Theatre?

A. It does.

Q. And I believed you testified on your direct examination those were made all in 1938 or the major part of them?

A. Not all. Major part.

Q. What was it you did then?

A. We re-seated, redecorated.

Q. What do you mean when you say re-seated?

A. Plush seats.

Mr. McClennen: Show that the answer was broken off because it was not completed when the next question was put.

The Court: It was re-seated.

Mr. Wright: It is probably obvious. I wanted to get a definition of the term before we left it.

The Witness: Re-seated.

Q. What do you mean? New seats?

A. Yes.

The Court: Go on.

A. (Continuing) Redecorated and various other improvements in the public spaces, like the wash rooms and carpets and a marquee.

Q. And how much did those improvements cost you just described?

A. Well, I haven't got the figures here. The total spent [fol. 4192] is $29,500 all together.

Q. Yes. Will you answer the question?

Mr. Wright: Will you read the question?

(The question was read.)

A. Well, I would say probably cost around $20,000.

Q. I believe you testified yesterday with respect to re-seating one of your theatres at Auburn, the Jefferson?

A. Yes.

Q. When you said re-seating then did you mean buying new seats?

A. Yes.

Q. When was that?

A. That was probably about '39 or '40.

Q. And when you did that you actually took out the old seats and put in new ones?

A. Yes.

Q. That is what you call re-seating?

A. Yes.

Q. You just did not recover them?

A. No.

The Court: Did you put $100,000 into a theatre in a place like Norwich?

The Witness: Yes.

The Court: $83,000 is for a site and building?

The Witness: Yes.

[fol. 4193] The Court: It seems such a large amount to me for the size of the place.

The Witness: You can't get anything for less, if you want a nice theatre.

The Court: It is a lot of money to put into a place of that size.

By Mr. Wright:

Q. Calling your attention to Lockport: I understand that you first bought the Temple there?

A. Yes.

Q. And then you converted—what was it—a skating rink into the Rialto?

A. We bought a building and built a theatre there, used the old walls and the roof.

Q. At about that time, as I understood your testimony, the people in the town there built the Palace?

A. Yes.

Q. Do you remember which project started first there?

A. Well, the foundation of the Palace was started six or eight years before by a different company and then it stopped. They didn't do anything then.

Q. And it was revived at about the time that you started to convert the Rialto?

A. Yes.

Q. A little bit before, wasn't it?

[fol. 4194] A. I wouldn't remember that.

Q. And then when it was completed it was operated by Paramount?

A. Yes.

Q. And at that time Paramount was out of your circuit, was it not?

Mr. McClennen: Just a moment. That is objected to as assuming that Paramount had ever been in the circuit.

The Court: Let him ask if Paramount was furnishing him pictures at that time.

Q. Were you buying Paramount features in your theatres you were then operating?

A. We bought Paramount pictures every year except one year or so.

Q. What year was that?

A. I don't recall.

Q. Might have been the year in which the operation of the Palace was taken over?

A. I don't recall what year it was.

Q. And then shortly after that you made a pooling arrangement with Paramount, isn't that right?

A. Not shortly after that.

Q. Well, how long after?

A. Well, I believe it was about two years after that.

Q. That you made the pool?

[fol. 4195] We made a partnership.

Q. And under which you split the profits from the town 50-50 between you and Paramount, is that right?

A. There weren't any profits to split.

Q. Well, whatever was earned was to be divided equally between you and Paramount?

A. That was the intent, but there were losses instead.

Q. You had the only theatres there, is that right?

A. No, Mr. Lanigan had a theatre there.

Q. Are you talking about the period before or after you made the pool?

A. That was before.

Q. And the agreement which you made, the pooling agreement, called for an equal division of the profits between you and Paramount, isn't that right?

A. That is what the partnership called for, yes.

Q. And you continued to manage the theatre?

A. Yes.

Q. And bought the films for them?

A. Yes.

Q. And you didn't mean to suggest here that there were no profits after the pooling arrangement was made, did you?

A. I do.

Q. There was none?

A. No profit, but losses.

[fol. 4196] Q. During that time, however, you received fees for booking the films?

A. I received a fee of $30 a week for managing the town.

Q. And you booked films too?

A. And booked films.

Q. Then you also testified, I think, that while this pool was in operation you kept the Hi-Art and the Temple both closed, weren't they?

A. The Hi-Art was closed before the partnership took place.

Q. Just answer the question.

Mr. McClennen: That, I submit, answers the question.

The Court: Were they both closed during the time of the partnership, that was the question, both the Hi-Art and the Temple.

A. Yes.

Q. And the Temple was then later converted into commercial property?

A. No, it was demolished.

Q. It was demolished and the Hi-Art stayed closed until when?

A. Well, it was opened in about '33, I would say.

Q. October, '33?

A. I don't remember the month.

Q. And when was it that you closed the Palace?

A. When?

Q. Yes.

[fol. 4197] A. In December, 1932, I believe.

Q. That was when you left the premises, but had you closed before then? Were you still operating?

A. We left forcibly.

Q. You say you were operating up until the time you left?

A. Yes.

Q. You hadn't closed it before then?

A. No.

Q. And then how long did this pooling arrangement with Paramount continue?

A. Until Paramount refused to put up more money.

Mr. Wright: I move to strike that.

The Court: The time.

Q. Just answer the question.

A. It terminated about that time.

Q. About the same time?

A. Yes.

Q. Then you got out of the Palace?

A. Yes.

Q. Then this pool with RKO, you say, was made in 1935?

A. In Syracuse. Yes.

Q. Did you have a pool with them anywhere else?

A. No.

Q. And before that time you had been operating the Eckel Theatre there?

[fol. 4198] A. The Eckel Theatre.

Q. RKO had all the other first-run theatres, except Loew's?

A. Loew's, yes.

Q. And that pool operates through the S. K. E. Operating Company?

A. Yes.

Q. And you own 30 per cent of the stock of that corporation?

A. There are two types of stocks there, A and B. We get 30 per cent of the profits. Originally it was 40 and 60. They got 60 and we got 40. The directorship, however, is equally divided, 2 and 2.

Q. Who are the two Directors who represent your interests?

A. I think myself is one and Mr. McKay is another, for convenience, living in New York.

Q. And the RKO directors?

A. They are—I know Mr. Kingsberg is one and an attorney, I think it is Whittman, is the other.

Q. And this division of profits that occurs through payment of dividends on stock, or is there some agreement in addition to the stock ownership with respect to how profits are to be divided?

A. Are you speaking of the first arrangement?

Q. Let us begin with the first arrangement.

A. I would like to have that question again, please.

(Question read.)

[fol. 4199] A. There is an agreement whereby we were to get 40 per cent and RKO would get 60 per cent.

Q. This is a written agreement you are talking about?

A. Yes.

Q. Who were the parties to that agreement?

A. I think it was RKO was one and one of our corporation was the other.

Q. Then is there another agreement in effect now, or modification of that agreement?

A. Yes.

Q. You still have a written agreement, then, that covers the——

A. Yes

Q. —division of profits?

A. Yes.

Q. Could you produce a copy of that agreement for us?

A. Not here, but I assume I could.

Q. You have one?

A. I think so.

Q. With reference to Canandaigua, Lake Theatre, I recall you said you opened it and then closed it, on your direct testimony; is that right?

A. Yes.

Q. How long was it you kept it open?

A. Several months.

[fol. 4200] Q. How many?

A. I would say about four or five months.

Q. Do you have an accurate record of that period?

A. I haven't here of that period but I can find out exactly the dates.

Q. Those few months are the only time it has ever been operated?

A. No, we tried again several times.

Q. You refer to a Veterans Hospital there that had something to do with your deciding to build that theatre?

A. Yes.

Q. Then that Veterans Hospital was built, was it not?

A. It was.

Q. So that there wasn't any change in your plans caused

by any change in the plans for the Veterans Hospital, is that right?

A. I don't quite get your question.

[fol. 4201] Q. Will you read it?

(Question read.)

A. The plans were changed by lack of business.

Q. Just answer the question.

A. Well, I think I have answered it.

Q. Will you repeat the question to him?

(Question read.)

A. The Veterans Hospital caused us to build the theatre.

Mr. Wright: I move to strike it out. Will you attempt to answer the question?

The Witness: If you will ask it to me so I can understand it a little better, I will try to answer it.

Q. Listen to it carefully.

(Question read.)

A. Why, I don't know as the Veterans Hospital changed any plans.

Q. You know they didn't?

A. Most likely didn't, I don't know anything about it, except they were to build one.

Q. And they built it?

A. Well, they built it and it didn't help our business.

Q. Now, you remember testifying this afternoon about completing this theatre in Salamanca, the last one there?

[fol. 4202] A. Yes, sir.

Q. You said, I believe 1939?

A. Yes, sir.

Q. Actually it wasn't completed until about three years later, was it?

A. In Salamanca?

Q. Yes.

A. I think you are wrong, Mr. Wright, pardon me. I don't want to question you, but when you said I said it was completed in 1939, I didn't say that as far as I recollect.

Q. What did you say?

A. I don't remember.

Q. What is your best recollection now as to what you said?

A. Regarding what, the Salamanca Theatre?

Q. Yes, when it was completed and opened?

A. I said it was completed about 1940 or '41.

Q. That is what you said, is it?

A. Yes, sir.

Q. Well, what is the fact?

A. I have my notes here. I can give you the information you want. It was finished in 1942. It was held up by some material they could not get according to my notes.

[fol. 4203] Q. Now, you have a set of records there which contain an accurate record of these dates you testified to?

A. Regarding the completion of the Salamanca Theatre?

Q. Yes, do those appear in your records, isn't that right?

A. Yes.

Q. If you wanted to give the Court an accurate statement of when these openings occurred you could have supplied an accurate record, couldn't you, and wouldn't have to rely on your memory?

A. I don't feel as though I wanted to delay the answer, it is about correct.

Q. You haven't answered the question. Will you read it?

A. I shall be glad to do so.

Q. I am not asking you to do it; I am asking you if you could not have done it instead of getting on the stand here and relying — your memory?

A. I could have done it. I could have referred to the record.

Q. Are there any of those other dates you gave us about openings or starting the construction that you think are as wrong as the one you gave on Salamanca?

Mr. McClennen: That is objected to, the witness is not called upon to compare, in a long examination, the different answers given for the different places, the forms of the [fol. 4204] questions varying as to those places.

The Court: I will let him answer whether there is any variance in the dates in the construction of other theatres.

Mr. McClennen: That wasn't the question I was objecting.

The Court: Or the comparisons.

The Witness: I don't think there was any inaccuracies in my answers.

The Court: The answer was it was opened in 1941, as I have it.

The Witness: Well, it was finished in 1942. There was some material they had to have.

Mr. McClennen: If your Honor please, the testimony as to Salamanca was not in error as to date as given by the witness.

The Court: My record is its opening was in 1941; it was bought in 1927, opened in 1941; the land was bought in 1927 and the opening was in 1941, as I have it.

Mr. McClennen: If your Honor please, the note that we have is that the construction started——

The Court: Are you reading his testimony?

Mr. McClennen: No, I was reading from a note, in order that there might be no misunderstanding as to what the tes-
[fol. 4205] timony was, and I, of course, haven't the stenographer's notes here, but the note that was made at the time was that he stated the construction started in 1939 or 1940, and opened a year later.

The Court: That would be 1941, wouldn't it?

The Witness: Opened a year later. It was opened in 1942.

The Court: 1941 would be the same date I have.

By Mr. Wright:

Q. You testified, didn't you Mr. Schine, with respect to the time when you got a permit for that theatre, did you not?

A. No.

Q. You didn't testify to that?

A. In Salamanca?

Q. Do you recall when you got the permit to start construction?

A. I do not.

Q. Does October, 1941, sound about right, is that right?

A. I don't know whether that would be the date or not.

Q. It might have been, you didn't start construction until the fall of 1941, is that right?

A. No, we started earlier than that.

Q. Did you get a permit before October, 1941?

A. I don't know when the permit was got.

Q. You usually get a permit before you start construction,
[fol. 4206] don't you?

A. Well, that is the usual procedure.

The Court: You must have some records to show.

The Witness: I haven't any records here, your Honor.

The Court: I mean you must have it somewhere?

The Witness: Yes, we would have a record in the office.

The Court: When you commenced construction and whether it was October?

The Witness: Yes.

By Mr. Wright:

Q. And you opened in the fall of 1942, according to the best of your recollection now, is that right?

A. In the summer of 1942, I believe.

Q. It was after August, wasn't it?

A. No, it was opened in August, not after.

Q. August what?

A. 1942.

Q. Do you know the date?

A. No.

Q. Now, with respect to this conversation you had, the conversations you had with Mr. Tishkorf on Rochester, as I understand you, all you told him about building a theatre near his Murray Theatre was that it would be foolish for you to do it, is that right?

A. Near the Murray Theatre?

[fol. 4207] Q. Yes.

A. It would be foolish for him to do it?

Q. I understood you testified what you told him, all you told him about building a theatre near his Murray Theatre was that it would be a foolish thing for you to do?

A. Yes, that is what I told him.

Q. And that is all you told him about it, is that right?

A. Yes, sir.

Q. And had you ever actually had any negotiations with respect to building a theatre near his Murray Theatre?

A. No.

Q. Never did?

A. Never did.

Q. Not at any time?

A. I was offered theatres in every part of Rochester, but I never gave it any consideration.

Q. Well, were you offered one near the Murray?

A. Well, I was offered in every part of the city. It probably included in that section as well.

Q. Are you referring now to offers of existing theatres?

A. No, new theatres.

Q. Somebody offered to build a new theatre for you?

A. That is right.

Q. Near the Murray Theatre, is that right?

[fol. 4208] A. I don't know whether it was near the Murray. I never went out to look at the site.

Q. You knew that the site that you talked about was right around the corner from the Murray on Lyle Avenue, didn't you, whether you looked at it or not?

A. Well, I did not know how close it was to the Murray.

Q. Well, you knew where the location was, didn't you?

A. No, I didn't go to look at the location.

Q. Just answer the question.

A. What was your question?

Mr. Wright: Will you read it?

(Question read.)

The Witness: I knew in what section of the town it was; approximately.

Q. And you know Mr. Goldstein?

A. Which Mr. Goldstein are you referring to?

Q. Well, what Mr. Goldsteins do you know in Rochester?

A. I know a lot of them.

Q. The one you discussed the location *new* the Murray Theatre with?

A. Well, I talked to many people in Rochester, and I don't remember their names.

Q. You don't remember whether these discussions you had with respect to a theatre near the Murray were with Goldstein or some one else, do you?

[fol. 4209] A. No.

Q. Do you remember when they occurred?

A. No, I don't.

Q. As a matter of fact, they occurred about the same time that you were negotiating with Tishkorf and Fogel, isn't that right?

A. I don't remember.

Q. Would you say they didn't occur then?

A. At one period every builder was offering me theatres in every part of the city.

Mr. Wright: I move to strike it out.

Q. Just see if you can answer the question.

The Court: Strike it out.

Mr. Wright: Will you read him the last question?

(Question read.)

The Witness: In reference to what theatre are you referring?

Q. The construction of a new theatre near the Murray?

A. I don't recall considering a new theatre near the Murray. I gave no consideration to offers of that type.

Mr. Wright: I move to strike it out.

Q. I did not ask you what you were considering.

The Court: Just answer the question and save time.

The Witness: I would say "No."

Q. No what, that you did not have any negotiations with respect to a theatre near the Murray at or about the time [fol. 4210] you were negotiating with Fogel and Tishkorf for the Webster, is that your testimony?

A. That I didn't have?

Q. Yes, your testimony is now you didn't have at or about that time, is that right?

A. Well, we—I can't remember when it took place—we had negotiations or we talked about theatres most every time I was in Rochester. Whether it was before or after I met Tishkorf, I can't recall.

Q. Now, you say, as I understood your direct testimony, when you first talked to those people about the Webster you told them that was no place to put a theatre and you didn't want any part of it, you didn't want any interest in it, is that right?

A. I didn't tell them in that way, Mr. Wright.

Q. You told them you were not interested in acquiring any interest in the theatre, isn't that correct?

A. That is right.

Q. Then later you told them you would take a half interest, is that right.

A. That is right.

Q. And the deal that you made, you got a half interest in the property and you got 5 per cent of the gross for booking the films, is that it?

A. Yes, and we invested $10,000.

[fol. 4211] Q. When you say you invested, you mean you advanced half of the first year's rent, is that right?

A. Well, I had to give them that, not the first year's, no.

Q. Is that the kind of expenditure you have listed on this Exhibit D-150 as an investment or cost of land or building or leases?

A. Do you see the Webster Theatre there?

Q. I am just asking you. Just answer my question.

A. No.

Q. You don't regard that as a capital investment, is that right?

A. No, not advanced rent.

Q. And part of the deal was that they were to get pictures to play with the Dixie and be able to play half the Dixie's product at the Webster?

A. Half the State.

Q. The State, I beg your pardon?

A. Yes, sir.

Q. So what it came down to, wasn't it, you gave them half of the State's pictures for five per cent of the gross?

A. No.

Q. Well, that is what happened?

A. No, we gave them half of the pictures, because we were interested in the theatre. We had a half partnership in it.

[fol. 4212] Q. And you got a percentage of the gross for taking care of the booking and buying of films?

A. And supervising the management.

Q. I understood you to say the management was in the hands of Mr. Fogel?

A. Mr. Fogel, but we were supposed to supervise it.

Q. I believe you gave testimony yesterday with respect to Corning, did you not, Mr. Schine?

A. I did.

Q. You undertook to tell us how the State had been operated there before you got it and after you got it?

A. Well, I can answer that question because it is broad.

Q. Well, read the question again.

(Question read.)

A. Got it when? I got it twice.

Q. When you got it back in 1933?

A. In 1933, yes, sir.

Q. And you said, I think, that it had just been operated showing Western pictures before that or on week-ends, Westerns and some second-run.

A. You mean after,—in 1933?

Q. The prior operation, that was your statement as to the prior operation?

A. When who had it?

Q. Fox.

[fol. 4213] A. Fox,—I was informed that they were running secondary pictures and Westerns in the State Theatre.

Q. And just operating it week-ends?

A. Yes, sir.

Q. Then I think you said that you maintained the same policy after you took it over.

A. I think we did, yes.

Q. As a matter of fact, your policy varied widely, did it not, during the next few years that you operated that theatre?

A. Oh, we tried every policy.

Q. You didn't have any set policy for it at all?

A. No, we tried every policy, but didn't make it pay.

Q. Your statement was incorrect, that you just simply followed the policy that had been followed by Fox?

A. For a while we did.

Mr. McClennen: That question is objected to, as contrary in its assumption as to what the witness said.

The Court: He said now he followed the policy for a while.

Mr. McClennen: The question was, it was incorrect. I was objecting to the question, that it was not incorrect.

The Court: He may ask him whether he made a statement [fol. 4214] that it was incorrect.

By Mr. Wright:

Q. That is what you testified to on direct-examination, that you followed the policy Fox had followed?

A. Yes, sir.

Q. I understand your testimony to be you followed a wide variety of policies?

A. Later on.

Q. How much later?

A. From time to time, if the policy we had didn't work, we tried another policy.

Q. You tried a number of policies, didn't you?

A. Yes, sir, we did.

By the Court:

Q. You mean by "policy", a change of prices?

A. A change, a different way of booking; sometimes booked it Sunday, Monday and Tuesday, and then when you find it is too long a run, you would book it in for Sunday and Monday only.

Q. The policy included, you mean, the type of picture and price?

A. That is right.

Q. And the changes?

A. That is right.

[fol. 4215]. By Mr. Wright:

Q. And that policy that you ran it on was directed, was it not, toward the acquisition by you of the Palace?

A. No.

Q. Had nothing to do with that?

A. Nothing to do with it.

Q. You weren't interested in acquiring the Palace at all while you were operating the State?

A. Well, I never gave it much consideration.

Q. Just answer the question.

A. What was the question?

(Question read.)

A. No.

Q. Never had any negotiations with respect to the Palace until 1938, is that right?

A. Never had negotiations as far as I know, I have no recollection of ever having negotiations.

Q. You personally, you don't know what negotiations may have been going on with other members of the organization?

A. Well, I would know if they had.

Q. Well, do you know?

A. I do not.

Q. You mean you don't know whether there were or not?

A. I have not heard of any negotiations.

Q. You know Mr. Gerber is dead, don't you?

[fol. 4216] A. Yes, sir.

Q. Died in 1940?

A. Yes, sir.

Q. Do you know where his son is?
A. I do not.
Q. You don't know that he is overseas?
A. I do not.
Q. Now, at the time that purchase was made, Mr. Robert Gerber was engaged with his father, Mr. Frederick Gerber, in operating the theatre, was he not?
A. I understood so.
Q. Well, you knew that he was?
A. I did not, but I was told he was.
Q. Didn't he go to work for you as a manager?
A. Yes, sir.
Q. And that was part of the deal?
A. Yes, sir.
Q. And then he worked for you for two years?
A. Yes, sir.
Q. And then you let him go?
A. We did not let him go.
Q. He left, anyway?
A. He resigned.
Q. And at the time the deal was closed you for one knew that Mr. Robert Gerber was not interested in leaving the [fol. 4217] theatre business?
A. I did not know that.
Q. Think anybody else in your organization did?
A. I don't know.
Q. You don't have any idea then as to what did transpire in the negotiations which led up to that sale?
A. Well, I have a pretty good idea.
Q. And entirely second-handed, isn't it?
A. No, I was kept informed.
Q. I say your information was second-hand?
A. Well, if you call it second-hand.
Q. And the impression you attempted to convey to the Court that the sale occurred because Mr. Gerber was ill, was entirely based on what other people told you, isn't that right?

Mr. McClennen: That is objected to in that form.
The Court: I don't understand the question myself. Read the question there.

(Question read.)

The Court: I will let him say whether he did seek to

convey the impression that it was because Mr. Gerber was ill that the sale took place.

The Witness: Mr. Gerber was ill, and I knew he was ill.

By Mr. Wright:

Q. Just answer the question that the Court asked you.

[fols. 4218-4219] The Court: Didn't you attempt to convey the impression to the Court that it was because Mr. Gerber was ill?

The Witness: Yes, sir.

By Mr. Wright:

Q. Do you know the name of the man who had the negotiations? You know who gave you the information?

A. About his illness?

Q. About the deal?

A. Yes.

Q. Mr. John May, is that right?

A. Yes, sir.

Q. Mr. May is available here; there is nothing to keep him from testifying in the case?

A. I don't know of anything.

Mr. Wright: I think, your Honor, this would be a good point to suspend if you are agreeable.

The Court: All right. We will suspend until tomorrow morning.

(Whereupon a recess was taken until Thursday, November 2nd, 1944, at 10 o'clock.)

[fol. 4220] UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

Civil 223

UNITED STATES OF AMERICA

vs.

SCHINE CHAIN THEATRES, INC., et al., Defendants

Continuation of trial before Honorable John Knight, United States District Judge for the Western District of New York, November 2nd, 1944, 10 o'clock A. M.

Appearances:

Robert L. Wright, Esq., John F. Clagett, Esq., Harold L. Schilz, Esq., Philip Marcus, Esq., Special Assistants to the Attorney General, and Milton Kallis, Esq., Special Attorney, in behalf of the United States.

Edward F. McClennen, Esq., Willard S. McKay, Esq., Saul E. Rogers, Esq., Arthur E. Whittemore, Esq., Arthur J. Homans, Esq., and Edward M. Antevil, Esq., appearing for the Defendants.

[fols. 4221] PROCEEDINGS

Mr. McClennen: Mr. Wright, we have got over the telephone from Miss Thompson, the best we could overnight, all those figures about which you were inquiring if you find that you want them.

J. MYER SCHINE resumed the stand in behalf of the Defendants and testified further as follows:

Cross-examination (continued).

By Mr. Wright:

Q. You have the Auburn figures there now, Mr. Schine?

A. Yes, sir.

Q. Will you tell us what was paid for the church property?

A. The church property cost originally $35,000. We bought additional——

Q. That was for the land and the building on it?

A. And the church, yes. We bought additional land which cost us $13,000 and another plot of ground which cost $5,316.

Q. When were those purchases made?

A. The church property was bought in——

Q. I am referring to the latter.

[fol. 4222] A. To the land that was bought in about—one piece was bought in 1937, I think, and the other piece was bought at about the same time.

Q. And that was the total cost of the land on which the Auburn Theatre stands?

A. That was the basic cost. We also spent, since its acquisition, in taxes and insurance, approximately $15,000 and the interest on the investment was $31,500.

By the Court:

Q. That would mean from the time——
A. From the time we bought the property.
Q. Up to the time of construction?
A. Up to the time of construction.
Q. Completion?
A. Yes, sir, the total is, therefore, $99,816. We received insurance, when the church burned down in the sum of $16,893.80, leaving a net investment of $82,922,20. No interest was computed on the cost of the second or third lots.

By Mr. Wright:

Q. Was that interest item $31,500?
A. Correct.
Q. That was interest accrued on the $35,000 investment?
A. Yes, sir.
Q. Over——
[fol. 4223] A. 15 years.
Q. 15 years?
A. Yes, sir.
Q. Was that interest actually paid or set up according to an arbitrary formula?
A. Actually paid at 6 per cent.
Q. To whom?
A. Well, we borrow money all the time and we pay that interest.
Q. You don't know whom the money was borrowed from, or who got the interest payments?
A. Well, for a period there was a mortgage on the property and we borrowed the money from banks at 6 per cent interest.
Q. Now, then, what was the actual cost of the building and equipment?
A. The actual cost of the building and equipment was $240,000 less $316.53, which would be $239,683.47.
Q. So that the information you supplied in the answers to the interrogatories I called your attention to was to the effect that the cost of land, building and equipment was $244,000 and some odd cents, that was an in-currate figure?
A. That was 150 per cent correct.
The Court: 150 per cent?
[fol. 4224] The Witness: Yes, your Honor, and I will tell you why. They did not charge for the land when they made

up that figure. They only charged for one piece of property which cost us $5,316 plus the cost of construction and equipment, and that is how they arrived at your figure.

By Mr. Wright:

Q. Yes, and in furnishing that figure then the error lay in not including the total cost of the land on which the building had been constructed?

A. They did not include the cost of the basic land.

Q. Now, on these other figures that you have given us on that Exhibit D-150, where you have land cost noted there, does that also include the cost of land and cost of, let us say, unexercised options that might have been taken on land in connection with the ultimate construction?

A. No, those are figures actually taken off our books.

Q. I assume they came off the books, but I am trying to get at how your books are set up. Do you include in your land costs such costs as options which might not have been exercised or costs of plans which were not used, and things of that sort?

A. They would not be included in the cost of the land.

[fol. 4225] Q. What that shows is not the actual cost, original cost, plus taxes and interest?

A. No, it does not include the taxes.

Q. What carrying charges does it include?

A. Nothing at all in the rest of it.

Q. You mean the Auburn figure was set up in a different manner from the other figures?

A. The Auburn figure was set up exactly as I told you.

Q. Yes, well, was the same method used in general in computing the other figures that are on Exhibit D-150?

A. No, sir.

Q. Why not?

A. Well, at the time the church burned it was allocated on a basis of $35,000 with $30,000 for the building and $5,000 for the land, and when it burned—then the building was depreciated right along each year—and when it burned down, having received the $16,000 in insurance, the land did not cost anything on our books, but that is the actual cost of what we have laid out in money.

Q. Then sometimes you used the cost as it appeared on your books, and in other cases you used other costs, is that right?

A. In this case we set up the figures exactly as it cost originally.

[fol. 4226] Q. Now, all the other figures are costs as per your books?

A. As paid without including taxes or insurance on any of these properties.

Q. But including interest, is that right?

A. No interest.

Q. Not including taxes, interest, or any other carrying charges?

A. That is right.

The Court: You are referring now up to the time of operation?

The Witness: Yes. This was a vacant lot where the others are operating theatres.

The Court: That would not be charged in that way?

The Witness: That is right.

By Mr. Wright:

Q. So that actually your book cost on that land was then the $5,000 figure, approximately the $5,000 figure, that was used in supplying the answer to the interrogatory?

A. That is the way they got up the interrogatories. The actual cost is $83,500.

Q. I believe you testified yesterday, or the day before, that you entered into the theatre business in Syracuse, is that right?

A. Right.

Q. You operated or participated in the operation of the [fol. 4227] Novelty Theatre there?

A. That is right.

Q. From 1917 to 1920?

A. No, it was from 1914.

Q. From 1914 to 1917?

A. That is right.

Q. Then you said you had sold out?

A. I did.

Q. The interest you had there was a lease?

A. A lease.

Q. And did you sell the lease to somebody else?

A. I did.

Q. Who?

A. Mr. Buck and Mr. Schafer.

Q. Then when you took this theatre over in Gloversville,—I believe it was the Hippodrome?

A. That is right.

Q. —that had been operated as a theatre before you took it over, was it not?

A. It was operated by different people and closed at different times.

Q. There was a theatre there at the time you took it over?

A. Yes, just as I described it.

Q. And you bought the Glove and took over the Glove and Family in 1920?

[fol. 4228] A. In 1920.

Q. And you closed the Family and operated the Glove and Hippodrome?

A. Not immediately.

Q. How soon afterwards?

A. Well, we ran it part-time. You see,——

Q. Just answer the question.

A. All right.

Q. When did you close it finally?

A. Finally we leased our theatres in Gloversville to the Fox-Metropolitan Company.

Q. That would be in 1929?

A. That is right.

Q. By the way, you didn't sell any of your theatres to Fox, did you?

A. No.

Q. You simply made a lease?

A. Made a lease.

Q. And then you got them back when the Fox-Metropolitan theatres went into bankruptcy?

A. That is right.

Q. Then I understood you to say yesterday that you bought or leased the Lyric Theatre from Mr. Smoots and you took over a lease he had on the Memorial?

A. No, we leased the Vine Theatre from Mr. Smoots.

[fol. 4229] Q. The Vine?

A. Yes.

Q. And you took over the lease he had on the Memorial at the same time?

A. That is right.

Q. What connection did Mr. J. S. Payne of Cleveland, Ohio, have with the Vine Theatre?

A. Mr. Smoots, six months after he leased the theatre to us, died and Mrs. Smoots married Mr. Payne.

The Court: Married Mr. Payne?

The Witness: Yes. Mrs. Smoots married Mr. Payne after her husband died.

By Mr. Wright:

Q. The lease than was with Payne?

A. No.

Q. You made the lease originally with Smoots?

A. Yes, sir.

Q. And then shortly after that you acquired the Lyric from Mr. Platt?

A. Yes.

Q. And then you closed the Lyric and the Memorial, did you?

A. The Memorial was closed when we first got it.

Q. Answer the question.

A. I am answering it.

Mr. McClennen: I submit that answers it.

[fol. 4230] The Court: After he got the Lyric?

The Witness: The Memorial was closed.

The Court: It was opened after you got it?

The Witness: We opened while we were remodeling the Vine and then after the Vine reopened we found the Memorial did not pay to operate it. We ran for awhile and then we closed it.

By Mr. Wright:

Q. Just answer the question as to the other theatre, the Lyric.

A. The Lyric was operated for a period full time, then business was so bad that we operated it week ends.

Q. You can give the explanation when your Counsel is examining you. All I want to find out is what the facts were as to when these closings occurred.

A. All right.

Q. As I understand it, you got the Vine and the Memorial from Mr. Smoots, and at the time you got them you say the Memorial was closed and the Vine was operated?

A. That is right.

Q. You then continued to keep the Memorial closed and you continued to operate the Vine, is that right?

A. At first we made an attempt to open the Memorial and then we found it didn't pay. We closed it again.

Q. You closed it how long after you acquired it, that [fol. 4231] you closed it again?

A. Several weeks after we acquired it.

Q. Was that before or after you acquired the Lyric from Mr. Platt?

A. That was after we acquired the Lyric, because the Lyric was acquired at about the same time.

Q. Then at the time you acquired the Lyric that was operating, is that right?

A. That was operating.

Q. And then when did you close the Lyric?

A. As soon as we found it was losing money.

Q. Just give it to us in terms of a date.

A. I should say a few months after that we closed part time.

Q. A few months after you acquired it?

A. Yes.

Q. You shut it down to part time?

A. Yes.

Q. Then when was it you shut it down all together?

A. Well, when business got very bad.

Q. Just give it to us by date.

A. I am not sure of dates nor am I sure we closed it all together.

Q. You don't remember?

A. I don't remember.

Q. Platt managed all your theatres in Mt. Vernon for [fol. 4232] you after you took over the Lyric, is that right?

A. Yes.

Q. Still does today?

A. Yes.

The Court: Where?

Mr. Wright: In Mt. Vernon is where these theatres were located.

Q. Mr. Schine, yesterday I think you testified that you sent some blue prints, or a blue print, to your architect in connection with Canandaigua in 1938, August, 1938. Do you recall that?

A. I don't recall testifying that way.

Q. What is your recollection now as to whether you did send the architect blue prints at that time?

A. I don't recall sending blue prints to the architect about Canandaigua at that time.

Q. Well, if it happens that you so testified would you say now you think you were mistaken?

A. I would.

Mr. Wright: Have you the Defendants' Exhibit D-151?

Mr. McClennen: 151, what is that?

Mr. Wright: It was a letter, I think, of August, 1938.

Mr. McClennen: Is that an exhibit or for identification?

Mr. Wright: Identified only, I believe.

Q. I hand you this letter that was marked Defendants' [fol. 4233] Exhibit D-151 for identification and see if that refreshes your recollection what the testimony was?

A. This does not apply to Canandaigua, sir.

Q. What does that apply to?

A. Salamanca.

Q. And it was with reference to Salamanca that you sent blue prints to the architect about that time?

A. It states so right on the top of the letter.

Q. I know what the letter states. I am asking you.

A. Yes. This is so.

Q. And the only blue prints referred to in that letter is a blue print of a lot, is it not?

A. That is right.

Q. Your testimony is not that you sent a blue print or prints of any theatre building to the architect at that time; is that right?

A. I certainly wouldn't have any theatre building blue prints to send to an architect.

Q. Just answer the question.

A. Well, I did.

Mr. Wright: Would you read it?

(Question read.)

The Witness: No.

Mr. Wright: Have you the letter, Defendants' Exhibit 45, a letter, I believe, addressed to Mr. Schine that was iden- [fol. 4234] tified and not offered, with reference to Medina? Have you got a copy of it?

Mr. Antevil: It will probably be back today. It went out the first thing yesterday morning.

Mr. McClennen: Mr. Wright, doesn't that Exhibit D-151 for identification say blue prints of the land?

Mr. Wright: Yes.

[fol. 4235] Q. Mr. Schine, I am calling your attention to a letter dated in March, 1937, signed by several citizens of Medina, Ohio; do you know the letter I am referring to? Do you recall receiving such a letter?

A. I do not know what letter you are referring to, sir.

Q. You don't recall if you received it or not?

A. No, I get a good many letters, and I would like to see the letter.

Mr. McClennen: Mr. Wright, are you in your question referring to this identification 45?

Mr. Wright: Yes, I am.

Mr. McClennen: That was the letter from the lodge, I think.

Mr. Wright: As I recall, it was signed by a number of people connected with the Odd Fellows Lodge in Medina.

The Witness: I remember that letter.

Q. Do you recall that letter now?

A. I remember that letter.

Q. Do you remember receiving it?

A. Yes, sir.

Q. With that letter in mind can you tell me whether in your testimony yesterday you sought to give the Court the impression that whenever you got a communication from local citizens that communication was an invitation to come into the town to build a theatre?

[fol. 4236] Mr. McClennen: That I object to.

The Court: Sustained.

Q. Now, do you recall testifying about the Strand at Auburn?

A. Yes, sir.

Q. I don't believe you testified as to when that was first acquired; can you tell us that?

A. I believe it was in 1927.

Q. That was after you acquired the Palace?

A. Yes, sir.

Q. Then you had the Strand and at that time M. A. Shea was operating the Jefferson?

A. We did not have the Strand alone. Mr. Shea had an option on the Strand, and he sold me a half interest in the Strand.

Q. Now, when was it Mr. Shea began to operate the Jefferson, then?

A. I do not know.

Q. Well, it was prior to that time, wasn't it?

A. Yes, sir.

Q. And then you were operating the Palace in opposition to Mr. Shea's Jefferson, is that right?

A. That is right.

Q. Then you and Mr. Shea made a pooling arrangement where you divided the town, is that correct?

A. We made a partnership for joint operation.

[fol. 4237] Q. And split the profits from all theatres operated in the town, is that right?

A. We had a 50-50 interest.

Q. That 50-50 interest extended to all theatre operations in the town, didn't it?

A. Yes, sir.

Q. You don't remember whether you got the Strand before or after you made that pooling arrangement?

A. It was after we made the partnership arrangement.

Q. When you acquired it did you operate it?

A. Oh, yes.

Q. How long?

A. Until it was condemned by the building authorities.

Q. When was that?

A. That was in about 1935 or '36,—1934 or '35, I would say. I don't want to give you dates, because I may be wrong on the exact date.

Q. 1934 or '35, and what do you mean when you say it was condemned, just what was done?

A. The building authorities demanded that the balcony be rebuilt, that the beams supporting the roof be replaced and the wiring be completely changed, and that entailed a much larger expense than the building warranted.

Q. You mean that they told you that those repairs and improvements would have to be made if you wanted to [fol. 4238] keep on operating it as a theatre, is that right?

A. That is right.

Q. You think now that was some time in 1935?

A. I think it was about that time.

Q. You testified yesterday at 4067 that—let us see if this recalls what you said—"Q. After you had opened the Auburn that, of course, was your first-run, preferred house?" and the answer is "Yes".

A. Yes, sir.

Q. "Q. And what did you do with respect to the other houses that you had there? A. The Palace continued on the same policy I had before. The Strand was at that time condemned by the local authorities, as being unsafe——"

A. That is right.

Q. Well, you opened the Auburn in 1938, did you not?

A. I mean it had been condemned previously.

Q. Then what you *you* meant to say was it had been condemned three years before?

A. That is right.

Q. The Auburn was completed?

A. That is just what I meant to say.

Q. And you went on to say that you closed it and you ultimately tore it down; how long did you keep it standing there closed?

A. Oh, we kept it standing closed, you mean, for the period?

[fol. 4239] Q. Yes, when was it?

A. That was, well, the building proved to be so unsafe——

Q. Just give me the time, just answer the question.

A. That was, I would say, around 1940, I would say, or 1939, I can't give you the exact date.

Q. 1941 or '42?

A. No, it was earlier than that.

Q. Earlier than what?

A. Earlier than 1942.

Q. You can't give the year?

A. I can't give you exactly the year. If you will pardon me, I may refer to my notes and see if I have got it.

Q. Go ahead.

(Witness examines notes.)

A. No, I have no record of it here, I am sorry.

Q. Then you went on to say, after you said you closed the Strand and ultimately tore it down, "The Jefferson we modernized and reseated to make it attractive, but we couldn't keep it open regularly for lack of pictures"; do you recall saying that?

A. Yes, sir.

Q. And then when was it that you closed the Jefferson?

A. I don't believe the Jefferson was closed wholly at any time. I think it was open week-ends.

Q. Well, when did you cut down the operation?

[fol. 4240] A. Well, I couldn't say just when, I don't think it was ever cut down completely. Sometimes, when we had product we would play a full week, and if we didn't, we would close during the early part of the week and open week-ends.

Q. It is a fact, isn't it, after you acquired the Auburn and opened the Auburn, you kept right on operating the Jefferson full time for a substantial period?

A. We kept it open when we had the product.

Q. Just answer the question.

A. Well, I did answer it. We kept it open as long as we had the product.

Q. Listen to the question.

A. All right.

Q. And I don't want an answer in terms of your conclusions; I want an answer in terms of dates.

A. I am giving you the answer according to the facts.

Mr. Wright: Will you read it to him?

(Last question read.)

The Court: "Yes" or "No" answer to that.

The Witness: Yes.

The Court: You spoke on your direct-examination of modernizing the Jefferson. When was that done?

The Witness: That was done in about——

[fol. 4241] The Court: I mean with reference to when the Auburn started.

The Witness: After the Auburn started.

By Mr. Wright:

Q. Now, at page 4073, do you recall testifying in this way, question by Mr. McClennen: "Q. Was there any reason known to you personally, beyond this lack of pictures that you have described, for closing the Jefferson down to a week-end operation?", and you answered "No", is that right?

A. That is right.

Q. Now, the fact is, is it not, that whenever you closed the theatre, the decision to close is governed by the

fact of whether or not it is finally advantageous to you to close it or to keep it open, isn't that right?

A. Well, if you have no pictures, it is financially——

Q. Just answer the question.

The Court: You would prefer to keep it open, it isn't a question of pictures, it is a question of its profitability.

The Witness: Yes.

By Mr. Wright:

Q. There are a number of other factors which enter into that determination of profitability other than picture sup-
[fol. 4242] ply, isn't that right?

A. Oh, there might be some.

Q. One reason might be it might assist negotiations with the landlord?

The Court: What?

Q. Might assist your negotiations with the landlord for renewals, if you had a theatre closed, is that right?

A. Not with me, sir.

Q. You never close theatres prior to negotiations for a renewal of the lease?

A. We never close a theatre for that purpose.

Q. Just answer the question.

The Court: You never closed a theatre prior to the renewal of the lease?

The Witness: Well, I can't recall. If the theatre is profitable we don't close.

Q. Now, do you recall closing the Strand in Syracuse prior to negotiating renewals, don't you?

A. That theatre was a losing theatre.

Q. Just answer the question.

A. Yes.

The Court: That, you said, was condemned?

The Witness: No, that is in Syracuse Mr. Wright is referring to, the Strand in Syracuse.

Q. Now, in your testimony about the pictures that were
[fol. 4243] available for the Jefferson, do you recall saying this at page 4071, a question by Mr. McClennen: "Q. Would you state again when it was the Auburn opened up?

A. The Auburn opened in '38 and we found that playing in the Palace six pictures, in the new theatre three, and the Capitol absorbing about eight a week, took up all the pictures"; do you remember saying that?

A. Yes, sir.

Q. That was a correct statement, was it?

A. About correct, yes, as to the number of pictures.

Q. Were you talking about feature pictures there?

A. Feature pictures, yes, sir.

Q. Now, it is a fact, isn't it that during the year 1938 the Capitol never played more than four pictures a week?

A. I wouldn't say that is a fact.

Q. Well, do you know whether it is or isn't?

A. I know they played double features there and have three to four changes a week.

Q. You know that, do you, they had that in 1938?

A. Yes, sir.

Q. You are positive of that?

A. I wouldn't say I am positive. They may change their policy every week, I don't know, but I have seen the newspapers of Auburn, and I saw how often they changes their pictures.

[fol. 4244] Q. Well, you know that they used three changes a week, double features, or six pictures a week during 1938, is that right?

A. They used a minimum of six.

Q. A minimum of six features

A. Six features.

Q. Each week during the year 1938?

A. Yes, sir.

Q. Throughout the year?

A. Yes, sir.

Q. Then your testimony is the same for 1939?

A. Well, it would be about the same, yes, sir.

Q. Well, how did you happen to say here that they were using eight a week?

A. They used between six and eight.

Mr. Rogers: Pardon me, Mr. Wright, the testimony is not that; the testimony is about eight a week as appears in the record.

Q. How did you happen to use the figure "about eight a week"?

A. They used sometimes three changes a week double features which would be six and sometimes four changes a week double features which would be eight.

Q. Your testimony now is during the year of 1938 they were using sometimes eight pictures a week, is that correct? [fol. 4245] A. That is right.

Q. And you know that to be a fact?

A. That is a fact.

Q. And you are quite sure about it, you don't have any doubts?

A. Well, as sure as anybody can be, I am not there at all times or any time.

Mr. McClennen: Mr. Wright, I invite your attention to Page 4072, the answer last on the page.

Mr. Wright: We will take him over the entire testimony with respect to what was played, if you will just be patient.

The Court: Yes.

Mr. McClennen: I am not at all impatient.

The Court: Just a moment, Mr. McClennen, let him proceed. You have a right on redirect examination to bring out any of these things you desire.

Mr. McClennen: If your Honor please, I expressly put my remarks so that it should not come to the attention of the witness but I thought Mr. Wright was in a misapprehension when he put his question as he did, and I called it to his attention on that account. If he doesn't desire it, [fol. 4246] of course, I do not press it.

Mr. Wright: Would you read the last question and answer?

(Question and answer read.)

By Mr. Wright:

Q. Well, your company maintains records of the play-off of pictures in Auburn, doesn't it?

A. As far as our theatres are concerned, we have a record of it.

Q. And you keep track of what plays at the opposition house, too, don't you, where there is one?

A. Well, those records are not kept systematically. We get reports as to what the other theatres are playing.

Q. And is the best evidence your company has as to what actually played the Capitol during the year 1939-

1938, the recollection that you are now giving us from the stand?

A. I was informed that they played between six and eight features a week.

Q. And you made a special effort to determine the accuracy of that information, Mr. Schine?

A. I didn't make a special effort, no.

Q. Well, who informed you of that?

A. Our booking department.

Q. And your only basis then for saying that you knew that they played six to eight features a week is that that [fol. 4247] is what your booking department told you, is that right.

A. That is right.

Q. And whether they are right or wrong, is something that you don't know?

A. Well, I assume they are right.

[fol. 4248] Q. Calling your attention to page 4072, you say there, in the answer to the question: "Q. How many pictures were you running at that time at the Palace? A. Palace we ran six.

Q. How many pictures were being run at the Capitol? A. Six to eight."

Now I will call your attention to the previous testimony so you can see if you can recall what time you were talking about. This was after you had a conversation you were asked about the conversation with Weinberg of Columbia. You said, "He said he doesn't want to sell second-run in the town."

A. That is right.

Q. Mr. McClennen asked you: "Q. At that time how many pictures a week were you playing at the Auburn?" You answered: "A. Three."

"Q. Was that being run as a single feature house?

A. Single feature for four days and double feature the last half of the week, three days.

Q. So that you took one picture for four days and two pictures for three days?

A. Yes. The single feature was sometimes run three days, depending on the merits of the pictures. Once in awhile we run it five days.

Q. How many pictures were you running at that time at [fol. 4249] the Palace?

A. Palace we ran six.

Q. How many pictures were being run at the Capitol?

A. Six to eight."

What time was that?

A. Well, that was after the Auburn Theatre opened.

Q. Well, how long after?

A. Well, I couldn't say exactly. We frequently modified the policy and run three changes a week at the new theatre, but in the past few years it has been running on a basis of two changes a week all the while.

Q. Is that the best answer you can give to my question?

A. Well, that is the best answer I can give, yes.

Q. And if you wanted to give the Court an accurate picture of what features played your theatres during this period, or any other time, you have records in the booking department which would show those facts, haven't you?

A. I have, and I believe I gave the Court the correct answer.

Q. Well, all you know is what your booking department supplied; is that right?

A. That is right.

Q. If there are any errors you are not in a position to say what they are or how they occurred?

A. Well, I doubt whether they were errors deliberately.

[fol. 4250] Q. Just answer the question.

A. All right.

(Question read.)

The Court: I think it appears he said his statement is based on the report in the booking department.

Mr. Wright: I beg your pardon?

The Court: He said his statement is based on the report of the booking department.

By Mr. Wright:

Q. The fact is, is it not, that you don't know how many pictures, how many feature pictures, were played at the Jefferson Theatre during 1938 or at the Capitol Theatre during 1938, 1939, 1940, or any other year, do you?

A. I do not know the exact number, but approximately I do know.

Q. And you don't know how many were played each week during those periods, do you?

A. Not exactly.

Q. Well, you don't even know, with any accuracy, approximately, do you?

A. Yes, I do.

Q. Of your own knowledge?

A. Of the information I have had from our booking department.

Q. I am talking about you, yourself.

[fol. 4251] A. Well, I haven't checked that.

Q. You personally don't have any knowledge on that subject, other than what you say your booking department gave you?

A. That is right.

Mr. Wright: If your Honor please, I move to strike this testimony that has been given as to how many pictures have been played at these theatres of his and the opposition. Certainly it clearly appears his statements are not the best evidence of those facts. He has no personal knowledge on the subject at all.

The Court: What is the testimony offered by the Government with respect to these theatres in the time that they were operating?

Mr. Wright: We gave testimony as to what the general policies were. I don't think we had any testimony which undertook to show the exact number of pictures played per week at any particular time. Now, if that is material I submit that the records should be brought here which show what was played. If it isn't, there is no occasion for Mr. Schine to make these statements which put us to the neces-

[fol. 4252] sity of producing the evidence which will rebut them.

The Court: Were you at Syracuse from time-to-time personally?

The Witness: Yes.

The Court: You know, yourself, of the showings of the pictures at these two theatres during that time?

The Witness: You refer to Auburn, don't you, your Honor?

The Court: I mean Auburn. I beg your pardon.

The Witness: I wouldn't know exactly how many pictures were played each week, because I don't keep track of each week's bookings, but the information I had is in accordance with what I testified to.

The Court: My point is, did you know personally about the showing of these pictures, whether you knew at that time, on the occasion of your visit at Auburn whether they were showing these pictures?

The Witness: When I was there at different times they either showed six or eight, meaning three changes or four changes a week.

The Court: Those occasions are within your personal knowledge?

The Witness: Yes.

[fol. 4253] The Court: I think the statements of the information from the booking department is hearsay. I believe it is hearsay, aside from what he has personally observed. I think the balance of his testimony relative to information obtained in the booking department is hearsay.

Mr. McClennen: If the motion of Mr. Wright is directed to what was brought out in direct examination, in this respect, we have no objection to its allowance. We do object to his cross-examining and bringing out facts and then having that stricken out.

The Court: It should all be stricken out, or, of course, there was no objection raised on the direct examination, anyway.

Mr. Wright: If the Court please, he simply gave these as facts.

The Court: I suppose your intent is to strike out all the testimony with reference to it?

Mr. Wright: Surely, with reference to it all. My only point is that there is no need, or there shouldn't be any need, to have us bring in rebuttal for evidence which is not competent anyway.

[fol. 4254] The Court: It seems to me it should be stricken on both the direct and cross.

Mr. McClennen: I object to the cross-examiner experimenting with the facts and after he has brought them out moving that his own be stricken out. I urge that that should not be done.

The Court: No, I believe after inquiries, if the information is not first-hand knowledge, if it is developed——

Mr. McClennen: Your Honor was stating your understanding of my agreement. I do not agree that what he has elicited on cross-examination should be stricken out. I have no objection to the allowance of his motion as to the direct examination, but that is the extent of anything being done by consent. What your Honor rules is a separate question.

The Court: Do you apply it to all of his cross-examination of this subject, do you mean, or just portions of it? It seems to me to strike out his statements with reference to the number of the showings of these types of pictures at these theatres.

Mr. McClennen: Your Honor, I take it, refers only to the [fol. 4255] Capitol Theatre, not his own theatres?

The Court: Yes, the Capitol.

Mr. McClennen: I await your Honor's ruling. We urge what has been brought out by Mr. Wright in cross-examination should not be stricken out.

The Court: Well, of course, I don't think it should all be stricken out. I limit the portion which should be stricken out, both as to the direct and the cross-examination, the statements of the witness as to the number and type of showing of pictures for specific times at the other opposition theatre.

Mr. McClennen: Well, does your Honor include in that the testimony of the witness when he was at Auburn?

The Court: No, no, that is just the point. I don't include that. I leave that in. I made it specific. Well, as to that, in so far as it is shown to refer to information obtained from his booking department.

Mr. McClennen: As to what was playing at the Capitol Theatre.

Mr. Wright: If the Court please, our motion goes farther than that. It goes to what was played at all of the [fol. 4256] theatres, which was based on something the booking department told him rather than what he observed himself.

The Court: Do you apply it to his own theatre, you mean, as well?

Mr. Wright: Why, yes. If some one were here who kept the records, we would expect to show on cross-examination that the statements which were made with respect to the policy of his own theatres are not accurate.

The Court: Well, if he makes a statement and it is not accurate—

Mr. Wright: I say the statement is made without any opportunity on our part to cross-examine the man who has the first-hand information, I say the statement, to the extent it is based on something his booking department told him, should go out.

The Court: He can know about bookings of his own theatres.

Mr. Wright: He says that he does not.

Mr. Rogers: There is no such testimony, no.

Mr. Wright: Let me ask a question.

By Mr. Wright:

Q. Mr. Schine, as to the number of feature pictures played in your theatree in Auburn during the years 1938, 1939, [fol. 4257] 1940, is there any part of that testimony that is not based on information that was supplied you for this purpose by the booking department of your theatre?

A. I know the policies of our own theatres.

Q. Let us just see what you know about policies during that period. You know, do you, how many features played each of your theatres in Auburn during the year 1938, is that right?

A. Not exactly, no, but I know the policy which would be at first when we opened the theatre we tried to run with three features a week playing Sunday, Monday, Tuesday, or Sunday, Monday, Tuesday and Wednesday, and double features Thursday, Friday, Saturday. Then we played Sunday, Monday, Tuesday and double feature Wednesday and Thursday. An other double feature Friday and Saturday or a single feature Wednesday and Thursday and a single feature Friday and Saturday.

Q. What theatre are you talking about?

A. The new theatre.

Q. The Auburn?

A. Yes. Then we finally settled on a policy playing one feature first half of the week and two features the last half of the week.

Q. Do you know when that change occurred?

[fol. 4258] A. I do not know exactly the date.

Q. You don't know when. What do you know about the policy of the Palace?

A. The Palace Theatre plays three changes, two features each.

Q. You are talking about what period?

A. Well, I talk about a period substantially the entire period.

Q. What entire period?

A. Between '38 and the present. That is what you are referring to, isn't it?

Q. What you are referring to, what you know about it?

A. Yes.

Q. Is there any particular week you might sometime have played seven features, with four changes?

A. That is possible.

Q. It is possible they did that for a substantial period of time?

A. It would be possible but I don't think it is probable.

Q. Well, you don't know, do you?

A. No, I don't.

Q. Now, the Jefferson?

A. The Jefferson played, at first, a policy similar to the new house, one feature the first half and two the last half, and then we tried different policies and finally——

[fol. 4259] Q. Do you know when the change occurred?

A. I don't know the exact date.

Q. Do you know the approximate date?

A. Well, the approximate date was from time to time after the new theatre opened—I can't give you the exact dates because we had many policies there.

Q. Do you know what the other policies were?

A. Yes. The other policies were the last half——

The Court: The Jefferson?

The Witness: The Jefferson.

A. —the last half of the week we played two features.

Q. That was one of the policies?

A. That was one.

Q. And what were the others?

A. The others were playing all week.

Q. How many features?

A. Three or four.

Q. Or five?

A. I don't think so. Not that I can recall.

Q. Well, you don't know whether there was a time when you played five or six or seven features at the Jefferson?

A. We never played seven features.

Q. You might have played five or six?

A. I wouldn't want to testify to that.

Q. You don't know?

[fol. 4260] A. But I am testifying to the best of my knowledge and I believe it is quite accurate.

Q. It isn't as accurate as your booking records, is it?

A. Not absolutely, no.

Q. They would be the best evidence of what policy you pursued in each theatre with respect to the number of features and the time during which it was, is that right?

A. That would be accurate so there is no error on a single feature.

Q. Let us see what you know about the policy at the Capitol. The information you got yourself you say you visited Auburn?

A. I visited Auburn.

Q. What were these occasions when you visited Auburn and you noticed the policy of the Capitol?

A. That was just when I happened to visit the theatres.

Q. Well, when?

A. During the summer of '38 or the fall. I visited several times.

Q. Do you know when?

A. I couldn't give you the date, no.

Q. You don't know the times at all that your observation of the policy at the Capitol relates to, is that right?

A. I visit the Auburn several times a year but I can't give you the exact date as to when.

[fol. 4261] Q. You can't give us the times or what you saw on any particular occasion with reference to the Capitol, is that right.

A. Well, I couldn't give you an accurate, detailed statement.

Mr. Wright: I renew my motion, your Honor.

The Court: I rule, as I have indicated before, that I refuse to strike out the testimony with reference to his own personal knowledge, to which he has testified, as to the Capitol Theatre. The testimony is that he has some personal knowledge of what was done, but other than as to the specific number of pictures that may be stricken out as hearsay.

Mr. Wright: I think that is all.

The Court: No further cross?

Mr. Wright: That is all.

The Court: Any redirect?

Mr. McClennen: No, your Honor.

That is all.

If your Honor please, we had planned on the expectation that Mr. Schine would be on all this week. When it began to be apparent that it was ending earlier we have hurried in some witnesses. I think that I can't get any here until [fol. 4262] 2 o'clock. If your Honor would adjourn until then we should be able to go on.

The Court: Is there anything else we can do in the meantime, anything else you have in mind?

Mr. McClennen: I don't know of anything.

I understand that some of the witnesses have arrived and we can go on in a very few minutes, if your Honor will adjourn until 12 o'clock.

The Court: All right, recess.

(Whereupon a recess was taken until 12 o'clock M.)

(Whereupon at 12 o'clock M. a recess was taken until 2 o'clock P. M.)

[fol. 4263] After Recess, 2 o'clock P. M.

Appearances: As before noted.

William C. Rowell, a witness called by and on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. McClennen:

Q. Mr. Rowell, what is your residence?

A. Rochester, New York.

Q. What is your occupation?

A. I am a representative for 20th Century-Fox pictures.

Q. A salesman?

A. A salesman.

Q. Did you occupy that same position in September and October of 1941?

A. I did.

Q. It has appeared in the testimony of Mr. Wallace in this case, beginning at page 2807, that you called upon him

on September 11th, 1941. Does that date conform to your recollection?

A. It does.

Q. Did you go because of some direction from some one else?

[fol. 4264] A. Well, I went at the request of Mr. Wallace, that he was interested in pictures.

Mr. Wright: I move to strike it out. It is not responsive.

The Court: First answer "Yes" or "No", if he went in response to somebody else. I sustain the objection.

Mr. McClennen: I will preface that question by another.

The Court: All right.

Q. Did you receive information of a telegram that Mr. Wallace had sent to your office?

A. Mr. Samson communicated that information to me.

Q. And it was in consequence of that that you went to see Mr. Wallace

A. Yes, sir.

Q. Without going into the details of what Mr. Samson said, did you receive from him instructions as to what you might say to Mr. Wallace?

A. I made that visit with Mr. Samson.

Q. And on that visit on the 11th of September, 1941, will you relate to the best of your recollection what was said by Mr. Samson, Mr. Wallace and yourself in as near as you can the order of the conversation, stating who said what?

A. Well——

[fol. 4265] Mr. Wright: Has this conversation been placed yet?

Mr. McClennen: This conversation is placed as the 11th of September.

Mr. Wright: I mean as to geography.

By Mr. McClennen:

Q. This conversation was in Syracuse?

A. At the Strand Theatre.

Q. At the Strand Theatre?

A. Yes, sir.

Q. Now, will you——

A. Mr. Samson really carried on the conversation.

Q. Tell us what Mr. Samson said.

A. He asked Mr. Wallace what he was interested in. Mr. Wallace told us he was interested in various runs, and if I can recall correctly——

Mr. Wright: That is objected to. Let him state what was said. That he was interested in various runs calls for a conclusion. Let us have the conversation.

Mr. McClennen: I agree.

The Witness: Well, Mr. Wallace was interested in some first-run.

Q. No, what Mr. Wallace said.

The Court: What did he say? Did he say he was interested in them?

[fol. 4266] The Witness: You are asking me to go back a great many years.

The Court: Give the substance of it.

The Witness: Mr. Wallace was some first-run pictures and we told Mr. Wallace we had an established first-run account and there were no first-run pictures available. He asked for second-run and we informed him we had an established second-run account and there was no second-run available. He asked for third-run and we also told him we had a third-run account of many years standing. Then Mr. Wallace said he was interested in anything at that time. Part of the time, if I recall it correctly, Mr. Wallace could not give us a definite policy that he was going to operate the theatre on.

Mr. Wright: If the Court please, this again is in the field of a conclusion.

The Court: What did he say in substance, that he could not give you any definite policy.

The Witness: Well, we did not make a deal that particular day because you can't make a deal on any kind of a product unless you know the policy the theatre is going to operate on.

[fol. 4267] The Court: What did he say about an indefinite policy, what did he say about that, the substance of it?

The Witness: Well, we did not make Mr. Wallace a proposition that day, and we told him we would see him later.

By Mr. McClennen:

Q. When did you see him next?

A. I believe the date was October 3rd.

Q. And was any one else with you at that time?

A. I was alone.

Q. At this meeting on October 3rd, 1941, was it at the same place, at the Strand Theatre?

A. The Strand.

Q. By the way, Mr. Samson, whom you have mentioned, was what?

A. He was Manager of our Buffalo Exchange.

Q. Now, before you went to this conversation with Mr. Wallace on October 3rd, 1941, had you had some conversation with Mr. Samson with respect to what you should do? I don't ask you what it was. Now, don't tell me what it was. I want to know whether you had any conversation on that subject.

A. Yes, sir, after we left the theatre that day we had a [fol. 4268] discussion on it.

Q. Now, on October 3rd, 1941, when you went to Mr. Wallace, had you already prepared a memorandum of possible offers to make to him?

A. No.

Q. I show you three papers which I will ask to have marked for identification with the next exhibit numbers.

(Thereupon the three papers referred to were marked as Defendants' Exhibits D-156, D-157 and D-158, respectively, for identification.)

[fol. 4269] Q. Are these three exhibits for identification, Defendants' Exhibits 156, 157 and 158 in your handwriting?

A. Yes, sir, they are.

Q. When were they written?

A. Well, they were written in Mr. Wallace's office, after he gave me his definite house policy.

Q. Then, before we go to these memoranda, will you state what Mr. Wallace said was his house policy on October 3, 1941?

Mr. Wright: I think that we ought to have the entire conversation and then as to what was said about the house policy can be gotten from that.

A. There was a record made of the house policy, as far as I can remember it.

Mr. Wright: Just a minute.

The Court: Just a moment. Go ahead and state what was said by Mr. Wallace.

The Witness: I asked Mr. Wallace if he had a definite house policy at that time. He gave it to me and from that house policy——

The Court: Just a minute.

Mr. Wright: What we want to find out is what he actually said to you and what you said to him.

The Court: Just a moment, Mr. Wright.

[fol. 4270] The Witness: As near as I can recall the house policy——

The Court: Just a moment. Let us go back a moment. We just want to save time and confusion, if we just limit our answers to the conversation, if you remember the substance of it, but what did you say on the subject matter?

The Witness: I will start all over again. He gave me the house policy.

The Court: Did you ask him?

The Witness: I asked him for the house policy. I wrote it down as he gave it to me.

The Court: All right.

The Witness: Now what?

The Court: You mean by "house policy"——

The Witness: Method of operation, the days, changes, the admission price, and various other things that go into the operation of the theatre.

Mr. McClennen: I will ask to have these two papers marked for identification.

(Thereupon the two papers, dated October 3, 1941, referred to were marked as Defendants' Exhibits D-159 and D-160 for identification.)

By Mr. McClennen:

Q. Are these two papers, Defendants' Exhibits D-159 and [fol. 4271] D-160 for identification, in your handwriting?

A. Yes, sir.

Q. And were they written on October 3, 1941?

A. Yes, sir.

Mr. McClennen: Will you mark another for identification?

(Thereupon the paper, dated October 3, 1941, referred to, was marked as Defendants' Exhibit D-161 for identification.)

Q. Is that paper, Defendants' Exhibit D-161 for identification, in your handwriting?

A. Yes, sir.

Q. And was that written on October 3, 1941?

A. Yes, sir.

Q. Do any one of these papers contain what you wrote with respect to the house policy?

A. This one does.

Q. You say "This one does", referring to Defendants' Exhibit D-159 for identification?

A. That is the house policy I am talking about.

Q. With that before you, will you tell me, in as near Mr. Wallace's language as you can, what he said his house policy was?

A. Well, Sunday, Monday, Wednesday, Thursday and Saturday he was going to charge them an admission of 25 cents an evening net, 25 cents; matinee, net 20, and children [fol. 4272] was ten cents. On Tuesday and Friday evenings there were 24 games of Bingo, $650 give-away, with admission to adults 50 cents net. He was to have two changes a week of pictures. They were to run Saturday, Sunday, Monday, Tuesday; another change Wednesday, Thursday and Friday. Policy in pictures, first-run if available; second-run, if available; third-run, if available. If those runs were not available he was interested in anything we had for sale.

Q. Did you then have some talk with him with respect to what you could offer him?

A. From the result of that I made him a proposition, which I put on paper.

Q. I show you Defendants' Exhibit D-156 for identification. From that can you state what you said to him as your proposition?

A. Well, this is a list of older top-grossing pictures, which the price was stated, and there was a companion picture, as I remember, everything double feature, and if he was interested in these pictures that I would send him a list of the companion pictures that were available for selection, and that he could buy these pictures in blocs of five, groups of five. That's all.

Q. And it was stated in the terms that you set down in [fol. 4273] this memorandum?

A. Just as it is there.

Mr. McClennen: I will offer this.

Mr. Wright: No objection.

(Thereupon the paper dated October 3, 1941, previously marked as Defendants' Exhibit D-156 for identification was received in evidence.)

Q. Did you make to him any other proposition?

A. Yes, sir, I did.

Q. Is this Defendants' Exhibit D-157 the proposition?

A. Yes, sir.

Mr. McClennen: I will offer this.

Mr. Wright: No objection.

(Thereupon the paper dated October 3, 1941, previously marked as Defendants' Exhibit D-157 for identification was received in evidence.)

By Mr. McClennen:

Q. Did you offer him a third proposition?

A. Yes, sir.

Q. I show you Defendants' Exhibit D-158 for identification. Is that the third proposition?

A. Yes, sir.

Mr. McClennen: I offer that.

Mr. Wright: No objection.

[fol. 4274] (Thereupon the paper, dated October 3, 1941, previously marked as Defendants' Exhibit D-158 for identification was received in evidence.)

Q. Relate, as nearly as you can, all that was said about these three propositions, 1, D-156, the other, D-157, and the other, D. 158, and I lay them all three before you to assist you refresh your recollection as far as it does.

Now, permit me to call this to your attention. You have stated in answer to several questions before the result in terms, "He wanted", and so forth. See if you can't give it in the terms that were said. Of course, we don't expect you are going to remember every word, but "he said" and "I said" with respect to those three separate propositions.

A. Well, I can take this D-157, I will recall more on that than any. Mr. Wallace objected to one thing, the fact that with his policy of Bingo he was unable to stand a 35 per cent of the gross.

The Court: What did you say first about the policy of Bingo?

The Witness: With his policy of $650 Bingo, give-away, they were unable to stand to pay 35 per cent of the gross receipts.

The Court: To your Company?

The Witness: I beg your pardon?

The Court: He couldn't stand to pay 35 per cent of the gross receipts to your Company, you mean?

The Witness: Correct.

[fol. 4275] The Court: If he had $650 Bingo.

The Witness: Yes. There was very little was said, as I can recall, on the balance of the pictures. I told Mr. Wallace I would discuss the Bingo proposition with Mr. Samson.

The Court: I thought you said this was the proposition made by you to him.

The Witness: I did make that proposition but he objected to a certain part of this proposition.

The Court: He objected to the amount?

The Witness: He objected to paying 35 per cent of the gross and giving away $650 Bingo.

The Court: You said——

The Witness: I said I would discuss that point of the thing with Mr. Samson.

The Court: All right.

By Mr. McClennen:

Q. Was there anything said in the conversation referring to this first one about the character of the pictures and as to their availability?

A. I don't recall anything regarding the character of the picture. Mr. Wallace did question the availability, that it might be after every other theatre in town, which didn't happen to be a fact as probably of the subsequent runs there were twelve or thirteen of them that hadn't [fol. 4276] been sold.

Mr. Wright: Is this a conversation now or is this something else?

By the Court:

Q. Did you tell him that or did he call attention to that?
A. He did question the availability date.
Q. What did you say when he did that?
A. I told him that——
Q. You say there was a large number available, did you tell him what they were?
A. I told him we hadn't sold but very few of the balance of the accounts, that is all I can recall of this, outside of the availability date and percentage; the availability date was in the conversation.

By Mr. McClennen:

Q. I notice on Exhibit D-157 there are some statements of availability, were those put on there at the time?
A. At the time I made the proposition out.
Q. That is, that "Charlie's Aunt" would be available October 29th, 1941?
A. That is correct.
Q. And "Private Nurse" November 20th, 1941?
A. That is correct.
Q. And "Wild Geese Calling" December 10th, 1941?
A. That is correct.
[fol. 4277] Q. Then again the two, "Sun Valley Serenade" and "Dressed to Kill", it appears "Saturday, Sunday, Monday and Tuesday, available December 10th, 1941"?
A. That is correct.
Q. And that was the date that you told him they would be available?
A. Yes, sir.
Q. Now, as originally written at first were these words "Ahead of Empire" on the sheet?
A. No "Ahead of Empire" was put on the sheet as we went through it, discussing it as these sheets were written, and he wanted to be assured that these pictures would be "Ahead of the Empire", so I added it on both sheets individually. There was a carbon copy of this.

The Court: Did you give him a copy of these?
The Witness: Yes, I did.
Mr. McClennen: I will say, if your Honor please, that Exhibit 818 has fastened together with a feature release sheet attached at the end of it, three sheets; the first sheet

is apparently a carbon copy of Exhibit 156, except that the words "To be selected in groups of five" are written on this first sheet of Exhibit 818 in original pencil and is not carbon from the other sheet.

[fol. 4278] The Court: Does it appear on the original?

Mr. McClennen: It appears on the original, but it appears on the carbon not in carbon. That is, it is obvious that the carbon had been made before those words were put on.

The Court: It does appear on the original?

Mr. McClennen: It does appear on the original and does appear on the carbon, first impression on the carbon.

The Court: All right.

Mr. McClennen: Then exhibit 157 is like the carbon which is the second sheet of Exhibit 818, with these differences, that on the carbon there appears the words "$650 Bingo—From Gross". That does not appear at all on Exhibit D-157 on the carbon. There is also in pencil, not in carbon "50-50-over $1200". That does not appear on the original. The words "Ahead of Empire" appearing on D-157 do not appear in carbon on the second sheet of Exhibit 818, but is written in in pencil "Ahead of Empire", again apparently added after the carbon had been made.

Exhibit 158 appears by carbon as the third sheet of Exhibit 818, with this exception, the words "No run" which [fol. 4279] appear on the original D-158, do not appear in carbon on the third sheet of Exhibit 818, but are written in in pencil "No Run", evidently added after the carbon had been made.

The Court: As I have the testimony of Mr. Wallace, didn't he testify that he played the runs shown on these exhibits?

Mr. McClennen: I am sorry, I haven't it in mind at the moment.

The Court: He also testified that Exhibit 818 was the offer of Mr. Rowell.

Mr. Wright: The offer he testified to is just what has been referred to here as this exhibit 818. This is what Mr. Wallace identified when he was on the stand.

The Court: Yes, he said it was the proposed offer by Mr. Rowell. All right.

Mr. Wright: Yes, sir.

The Court: All right.

By Mr. McClennen:

Q. Was there any talk as to what season's product this proposal, Defendants' Exhibit 157 was?

A. Well, that was current product.

Q. That was current product?

[fol. 4280] A. Current product.

Q. That is of the year 1941-42?

A. Current releases.

Q. This proposal, Defendants' Exhibit D-158, of what season's product was that?

A. That was the previous season's product.

Q. That is the 1940-41?

A. 1940-41, the 1940-41 season.

Q. Now, this other proposition, Defendants' Exhibit 156, what was the significance of the words "Return engagement special" at the top of the sheet?

A. Well, these pictures were older, they had been top grossing pictures and we were bringing them out as return engagement special productions.

Q. Was there anything said with respect to whether these three propositions were alternate propositions or separate propositions or together?

A. They were to be bought just as they were written.

By the Court:

Q. What does that mean, were they alternate propositions?

A. He could buy any or all of them, just as he pleased, just as they were written on the individual sheets.

Q. The question is whether they were duplications, different pictures in each group?

A. Well, there were three individual propositions there.

[fol. 4281] Q. What I am getting at, were the individual propositions of separate productions, I mean, pictures?

A. No, they were separate propositions, they were a number of products on each sheet, one was not dependent on the other. He could take any one of those propositions or could have them all.

Q. That isn't the question. Was there a duplication of pictures on the sheets?

A. No, sir.

By Mr. McClennen:

Q. I call your attention to Plaintiff's Exhibit 978, with the approval stamp stencil April 13th, 1942; Exhibit 977, with the approval stamp date January 21, 1942; Exhibit 976 with the steneil acceptance date January 12th, 1942; Exhibit 975 with the stencil acceptance date December 18th, 1941; Exhibit 974 with the stencil acceptance date December 18th, 1941; Exhibit 973 with the acceptance stencil date October 30th, 1941; Exhibit 972 with the acceptance stencil date October 30th, 1941; Exhibit 971 with the stencil acceptance date October 30th, 1941; Exhibit 970 with the stencil acceptance date October 25th, 1941; Exhibit 969 with the stencil acceptance date October 17th, 1941; Exhibit 968 with no stenil, but having a date stamp on it of September 24th, 1941; Exhibit 967, no stencil, but a stamp date September [fol. 4282] 24th, 1941; Exhibit 966 with the stamp date September 24th, 1941; Exhibit 965, no stencil, with the stamp September 25th, 1941; Exhibit 964, with the acceptance stencil date October 14th, 1941; and No. 963 with the acceptance date October 14th, 1941 in stencil. Will you look at that group or set of exhibits and inform me whether you had — to do with the sale of any of those contracts? If you find that you did have, state the exhibit number as you answer.

A. Well, Exhibit No. 978 I did; Exhibit 977, yes; Exhibit 976, yes; Exhibit 975, yes; Exhibit 974, yes; Exhibit 973, yes; Exhibit 972, yes; Exhibit 971, yes; Exhibit 970, yes; Exhibit 969, yes; Exhibit 968, yes; Exhibit 967, yes; Exhibit 966, yes; Exhibit 965, yes;—do you want me to turn these over that I had nothing to do with?

[fol. 4283] Q. No, just mention that you didn't, with the number.

A. 964, no. 963, no.

Q. At the time that you made the offers to Mr. Wallace on October 3, 1941, were the pictures available as stated by you to him?

A. On those dates.

The Court: You mean those dates on the exhibits?

The Witness: The dates that are written on that exhibit, whatever the number is.

Mr. McClennen: The witness refers to Defendants' Exhibit D-157 and to the second page of Exhibit 818.

Q. You left with Mr. Wallace, did you, these first three pages of Exhibit 818?

A. Yes, sir.

Q. Were they separate sheets at the time you left them?

A. Separate sheets, absolutely.

Q. After you had made these three offers to Mr. Wallace on October 3, 1941, relate, as nearly as you can, all of the conversation, if there is any left, beyond what you have already stated.

A. Well, on one of those sheets—I would have to see the number—he thought there were too many pictures. On this particular sheet he thought there were too many pictures.

Q. You are referring to Defendants' Exhibit D-156?

[fol. 4284] A. I am referring to Exhibit D-156, and at that time I wrote on the sheet that they could be selected in groups of five. That's all there was in reference to that. There was no comment on this, as I recall.

Q. Referring to Exhibit D-158?

A. D-158. And there was no further comment on that, outside of the fact that he did make me a counter-proposition, as I recall now.

Q. You are referring to Defendants' Exhibit D-157?

A. I am referring to Defendants' Exhibit D-157.

Q. And what did he say?

A. As near as I can recall, I made a counter-proposition that he could take his house expense and the cost of the Bingo and we would split over $1600 gross, as I can recall. There should be a report on that because I sent a report in. I can't give you the exact figure because it is too far back.

Q. Now, in that connection, on the sheet that you say you left with him, which has now been stapled as a part of Exhibit 818, appear the words "50-50 over 1200". Does that recall anything to your mind?

A. This I know nothing about. This isn't my writing.

Q. Well, what did you say about a counter-proposition?

A. I believe it was $1600 split figure, that he be permitted to deduct the house expense, and I believe it was the amount [fol. 4285] of the Bingo and split over $1600. I believe that was his counter-proposition.

The Court: Was that the counter-proposition to your No. 2 proposal there, $600 Bingo proposition?

The Witness: No, I hadn't made him any proposition out-

side of the 35 per cent, and I told him I would discuss it with Mr. Samson and he told me he would make a counter-proposition to discuss.

The Court: That is the one offered on the basis of $1600 or $1650?

The Witness: Right. I believe it was $1600. I can't state positively.

Mr. McClennen: It is Defendants' Exhibit D-157 that is the 35 per cent.

The Court: There are three of those?

Mr. McClennen: Yes. He made this counter-proposition, you say, and you said you couldn't do anything about it but discuss it with Mr. Samson?

A. I would discuss it with Mr. Samson.

Q. Did you subsequently discuss it with Mr. Samson?

A. I did.

Q. And after that discussion did you return at some time to Mr. Wallace and see him again at the Strand Theatre?

[fol. 4286] A. I did.

Q. And I show you two papers that I will ask to have marked for identification.

(Thereupon the two papers dated October 10, 1941, referred to were marked as Defendants' Exhibits D-162 and D-163 for identification.)

Q. These two papers are marked for identification D-162 and D-163. Are they in your handwriting?

A. Yes, sir.

Q. When did you write them?

A. On October 10, 1941.

Q. And is that the date of your next interview with Mr. Wallace?

A. Yes, sir.

Q. Now, with the assistance of those memoranda will you relate, as nearly as you can, the whole of that conversation in the terms "he said" and "I said," or "I said" and "he said"?

Mr. Wright: The date of this?

Mr. McClennen: October 10, 1941.

A. Well, in relation to the counter-proposition, or that is the proposition of the percentage pictures with Bingo and his counter-proposition, I made him another proposition

in which I offered to permit him to deduct the difference between the Bingo admission and the regular admission [fol. 4287] before computing the percentage.

Q. Did he say anything about that?

A. I can't recall whether he did or not.

Q. And it is to that that this Exhibit D-163 refers?

A. That is the proposition it refers to.

Mr. McClennen: I will offer Defendants' Exhibit D-163.

Mr. Wright: No objection.

(Thereupon the paper dated October 10, 1941, previously marked as Defendants' Exhibit D-163 for identification was received in evidence.)

The Court: What do you mean, deduct the difference between the Bingo admission? That is an additional amount?

The Witness: No, he was charging 50 cents for Bingo and 25 cents was his normal admission. I allowed him to deduct the difference between 50 and 25, otherwise I would only receive the percentage on the normal admission, nothing to do with the additional admission to see the Bingo.

The Court: All right. Did the house receive any revenue for the playing of Bingo, other than the admission?

The Witness: I didn't get you.

The Court: It might be involving some question of lia- [fol. 4288] bility. I don't know. I don't mean this case. What is the difference? Do they generally charge for the Bingo?

The Witness: Well, a number of theatres run pictures and Bingo.

The Court: The point of my inquiry was whether the admission was increased, the price that the spectators pay to play the game.

The Witness: I couldn't answer that, sir.

By Mr. McClennen:

Q. Now, does this Exhibit D-162 for identification also refer to this same matter of your interview on October 10, 1941?

A. This is my report to the office on the result of the visit of October 10th. That is my report to the office.

Q. Was anything more said at that interview on October 10, 1941?

A. If there was I can't recall it.

Q. Was there in any form or words any acceptance or rejection of the pending offers?

A. Well, there wasn't any acceptance or I would have written a deal.

Mr. McClennen: That is all.

[fol. 4289] Cross-examination.

By Mr. Wright:

Q. Mr. Rowell, how long have you been a film salesman for Fox?

A. 25 years.

Q. And in the course of performing that job you ordinarily take an application when you solicit contracts?

A. If we can make a satisfactory deal, yes.

Q. That is the way your business is ordinarily done, isn't it? You go out and talk to the exhibitor first and then you work out a deal, you fill out a contract form, is that right?

A. If we come to terms that is the way it is done.

Q. You write up a contract and the exhibitor signs the application?

A. That is right.

Q. And then you send it in to the Exchange and take it back to the Exchange?

A. Either mail it or take it in.

Q. And it goes to the home office?

A. Right.

Q. And if it is approved it is sent back to the exhibitor?

A. Right.

Q. And if it is disapproved then what do you do?

A. Go back to the exhibitor.

Q. And see if you can make a better deal?

[fol. 4290] A. That is right, see if we can get the terms the Company wants.

Q. Then, before you solicit an exhibitor on any particular deal, what do you do with respect to determining how much film rental he ought to pay?

A. What do I do?

Q. Yes.

A. Well, I have covered that territory for 25 years and I pretty near know what the terms ought to be. It isn't a question of sitting down and working out a deal with myself. I have sold those accounts for 25 years.

Q. In Syracuse?

A. I worked in Syracuse off and on for 25 years.

Q. And you know and you knew at the time back there in '40-'41 what the Syracuse theatres were accustomed to pay for Fox films?

A. Correct.

Q. All of them?

A. No, there are some of them I didn't handle.

Q. Those you didn't handle you weren't familiar with, is that right?

A. Not fully familiar, no.

Q. Had you handled the Strand before?

A. No, sir.

Q. That is the first time you ever sold the Strand?

[fol. 4291] A. I will take that back. Years ago, yes, the early '20s, I handled the Strand Theatre.

Q. When Warner was operating it?

A. No, before Warner was operating it. When Moe Marks was operating it.

Q. You hadn't sold any pictures to the Strand since then, is that right?

A. I didn't sell them any then.

Q. What?

A. I didn't sell them any then.

Q. I say you haven't sold any since?

A. No, sir.

Q. Then when you went out to see Wallace to make this offer had you made any inquiry to determine what the Strand had been paying for Fox films?

A. Well, the Strand hadn't been playing any Fox films of that particular run. This was completely a new venture, completely new run, completely new everything.

Q. See if you can answer the question.

Mr. Wright: Will you read it?

(Question read.)

A. No.

Q. As I understood your testimony, the first thing that happened when you saw Wallace alone was that he told you what the policy of the house was and you wrote it down on [fol. 4292] this piece of paper that is marked Defendants' Exhibit D-159?

A. That is correct.

Q. Was that some paper you brought with you or did he give it to you? Do you know where it came from?

A. It came from the back of my book. It happened to be the hotel I stop at and it was some scratch paper I had in the back of my book.

Q. You had some paper in your pocket and you wrote this down?

A. In my book.

Q. Then the next thing that happened was that you wrote down these propositions here that are set forth in Defendants' Exhibits D-156, D-157 and D-158?

A. Correct.

Q. Where did you get the paper for those, that they were written on, do you know?

A. Possibly back of my book, probably from Mr. Wallace's office.

Q. You don't know where it came from?

A. I can't tell you. I just pick up any paper and stick it in my book.

Q. You just picked up these papers. Did you have a sheet of carbon paper with you?

A. Always.

Q. And you took the carbon and put it in between the [fol. 4293] two sheets. You wrote these out. Which one did you write first?

A. I can't tel- you that. I can say I wrote this one first because that was your current product.

Q. 157 first?

A. I would say so, yes.

Q. And then did you write 156 and 158 immediately or was there some talk about 157?

A. I wrote them all out together.

Q. First you wrote out 157?

A. It probably was the first one.

Q. Then you wrote out the other two immediately with the copies. Then what did you do with the copies?

A. Gave them to Mr. Wallace.

Q. Did you give those to Mr. Wallace?

A. I retained those.

Q. Then when you had your discussion of the terms did you discuss them separately?

A. As an individual deal. They were individual deals.

Q. You discussed each one individually, is that right?

A. Individually.

Q. Which one did you discuss first, do you remember?

A. I would still make a guess that it was the current product.

Q. You still think it was 157?

A. Because that is what he was more interested in.

[fol. 4294] Q. In the course of the discussion you wrote down "Ahead of Empire," on your original 157 there?

A. Right.

Q. And then you reached over and wrote down "Ahead of Empire" on this sheet that is attached to 818?

A. That is correct.

Q. Then you had the discussion about the Bingo. Was that when you had that discussion?

A. We were discussing this proposition here (indicating).

Q. The current product. You didn't write anything down with respect to the Bingo, is that right, on either?

A. Just what do you mean on that? Do you mean in respect to something I agreed to let him do?

Q. No, as to what he had said he had wanted to do in respect to Bingo.

A. These were proposition sheets.

Q. There was nothing written by you?

A. Not on those sheets.

Q. On either copy, with respect to Bingo?

A. No, sir, not on those sheets.

Q. With respect to your D-157, you told them that you had been authorized by the Company to make this particular proposition that is set forth there?

A. (Witness nods in negative.)

Q. What did you tell him?

[fol. 4295] A. I told him that was the proposition we were making.

Q. Whose proposition was it?

A. It was mine. It wasn't the Company's. It was my proposition.

Q. This was your idea of what the deal ought to be?

A. No. I had, after our first visit, seen Mr. Samson. We had generally discussed terms but we could not put anything down, anything concrete, until we had a house policy, and from the house policy I made out those deals.

Q. After you got the house policy, this that you wrote down here on this proposition sheet, as you have referred

to it, marked D-157, was your idea of what he ought to pay for those pictures in that theatre on that policy?

A. That is correct.

Q. And you didn't, as I understand it, have any authority to accept or make the deal at that time if he had said "Yes, I want them at those terms"; is that right?

A. If he said "Yes, I want them", I would have written a contract.

Q. You would have then prepared an application, is that right?

A. That is correct.

Q. And you would have him sign it?

A. That is correct.

Q. And the application would have had to go through the [fol. 4296] normal channels?

A. Through the normal channels.

Q. And be approved before he had a deal, is that right?

A. Yes.

[fol. 4297] Q. And then the same thing,—oh,—with respect to those availability dates, now, how did you determine those?

A. How did I determine those dates?

Q. Yes.

A. I had my third-run dates. I determined them from the third-run dates.

Q. You knew then when these pictures were going to play third-run?

A. Yes, sir.

Q. And then what did these dates represent with respect to availability in terms of number of days after third-run?

A. Well, that I can't answer, because I don't think they are all the same. I don't think they are the same number of days.

Q. Well, how did you determine it?

A. Well, that was determined from a lapse of playing time between third-run and the time I made it which would permit other theatres to play the pictures, certain theatres that it was necessary to protect on account of the $650 Bingo; not necessarily the theatres, but our own product it was necessary to protect.

Q. What were the pictures you wrote the availability date to protect?

A. It would be what theatres that had been sold at that particular time, I can't answer what those were.

[fol. 4298] Q. You don't know what those were, but those included the first three runs, is that right?

A. First three runs.

Q. As I understand you to say these availabilities were all after the first three runs?

A. Correct.

Q. So you had then sold the first three runs?

A. Yes, sir.

Q. By the way, at this point have you been able to locate the second-run contracts yet? I might say, so that your Honor would know what these contracts are about here, these that were identified as Exhibits Nos. 963 to 978, inclusive, were produced in response to a subpoena calling for all of the Syracuse contracts for the sale of these five pictures that are contained in this offer and the exhibit No. 979 was left open for the second-run contract which was not available at the time these others were identified, and I, of course, would like to have that contract before we conclude the examination of Mr. Rowell.

Mr. Caskey: You can't.

Mr. Wright: You had it here once before.

Mr. Caskey: We sent it back. It is in New York.

The Court: Well, is there any dispute about the fact that there was this second-run contract?

[fol. 4299] Mr. Wright: Well, I don't know. At the time I asked for it there seemed to be some question as to whether there was a contract or where it was.

The Court: How would that have any effect?

Mr. Wright: I wanted to know definitely here what the situation was with respect to those first——

The Court: You mean the first——

Mr. Wright: The first three runs.

The Court: That they were exhausted, you mean?

Mr. Wright: No question about the fact that the first three runs had been sold on these five pictures at the time you made this offer, is that right?

The Witness: That is correct.

Mr. McClennen: In order that the record may not confuse us at a later time, this request for the production of these contracts is addressed to Warner's representatives and not to the defendants; Fox representatives, I beg your pardon.

The Court: You wouldn't naturally concede that you had the second-run; you wouldn't have the second-run contracts, you mean?

Mr. McClennen: We wouldn't be having the second-run. [fol. 4300] The Court: No, I say that.

Mr. McClennen: The reference in this long list of contracts that were put in, it appears that there were only four that had been accepted.

The Court: The witness said that they had all been exhausted.

By Mr. Wright:

Q. The first three runs were sold, were those all exclusive runs in Syracuse?

A. Exclusive runs, first-runs, second-runs, third-runs.

Q. Then there were some other theatres, you say, that you, in addition to those that you fixed these availability dates to protect?

A. Not to protect the theatres, but to protect our pictures.

Q. Well, protecting your pictures in other theatres than those first three runs?

A. We had some valuable pictures there, and pictures running a house with Bingo $650——

Q. Let is see if I can get an answer to the question, the first-run theatres there that had contracts for the pictures were what, do you know?

A. First-run theatres?

Q. Yes, maybe this will help you.

A. R.K.O., Paramount and Capitol.

Q. That is according to this contract No. 963, the first-[fol. 4301] run was all for exhibition in the Paramount, Strand, Keith and Eckel, is that right?

A. Strand is something I didn't make the contract for; Paramount, Keith or Eckel.

Q. That was made at a time when the Strand was still in the pool?

A. Yes, sir.

Q. And then the exhibit No. 964 is the contract for a move-over at the Eckel, is that right?

A. That is correct.

Q. That would be a run immediately following the first-run?

A. Not a run, it is a move-over.

Q. Well, the picture would play under this contract marked Exhibit No. 964 immediately after the conclusion of the play date at the Paramount, Keith or Eckel, is that right?

A. Well, you have the conclusion that it is at the finish of the engagement. It was a move-over and as soon as one house was finished it was moved over to the other house.

Q. That is what I was saying.

A. You said at the conclusion of the engagement; there isn't any conclusion of the engagement until it finishes at the Eckel.

[fol. 4302] Q. Then the picture would play at the Regent; is that right?

A. That is the second-run theatre, that is correct.

Q. That we don't have the contract for; then that would play at the Cameo?

A. Correct.

Q. Third-run, not less than seven days after the run at the Regent, is that right?

A. I don't exactly know the clearance offhand, but whatever is on there, third-run, Syracuse, seven days after Regent Theatre, seven days clearance on all subsequent-runs.

Q. Do you know what the interval was there that the Regent was supposed to play behind the Eckel?

A. 30 days.

Q. 30 days. Then after the conclusion of the run at the Cameo a picture would be available to all of the other runs in Syracuse, is that right, simultaneously?

A. Well, not all of them, no. There are some other runs that might have a clearance over some other in the particular zone, but, generally, they would be available after the Cameo.

Q. Well, now, what if any theatres were there other than the Regent and Cameo and Keith, Paramount and Eckel that you fixed this protection with reference to?

[fol. 4303] A. This protection?

Q. Yes.

A. None I have reference to there, but you said they would be available for all theatres; there are some theatres that they wouldn't.

Q. I understood you to say that in fixing these availability dates that are on this Exhibit D-157, you fixed those with reference to protecting the exhibition of these pictures in certain theatres?

A. Those theatres that had already been sold the product.

Q. Now, you don't know then what the names of those theatres are?

A. What the theatres are now, I could not tell you without the contracts.

Q. You don't know whether they included more than I have just mentioned or fewer?

A. Well, it wouldn't include the Regent and Cameo, because they are prior runs.

Q. And it wouldn't include the Novelty, either?

A. If the Novelty had been sold prior to that time (September 12th, yes, it would include the Novelty.

Q. And Happy Hour?

A. Novelty and Happy Hour, yes, I would say so. I would say it wouldn't include this, because it was a late dating house.

[fol. 4304] Q. And the Harvard?

A. The Harvard, possibly include the Harvard.

Q. And is that the Turn Hall?

A. No, it didn't include the Turn Hall at all because the Turn Hall wasn't sold at that time; it couldn't include the Turn Hall.

Q. It happens the Turn Hall was sold here October 9th, is that right?

A. That is correct.

Q. And this offer was made on October 3rd, is that right?

A. Correct.

Q. So then——

A. It didn't include this offer.

Q. So those theatres you were protecting then in addition to the first three runs were the Harvard, the Happy Hour and the Novelty?

A. Not the theatres, I was protecting——

Q. Is that right?

A. Not the theatres, I was protecting my product.

Q. You were protecting the exhibition of your product by these availability dates?

A. Not the Novelty?

Q. The Novelty, yes.

A. The Novelty happens to be a very, very late dater, six months after the release.

[fol. 4305] Q. Do you want to correct your testimony?

A. Not the Novelty, you said the Novelty.

Q. You said, as I understood, that the ones you fixed the

preference for product, those were the ones sold prior to October 3rd?

A. The Novelty didn't include that.

Q. Did you say that?

A. Yes, sir, I did.

Q. It now appears you were mistaken?

A. On the Novelty. After all, I am guessing what contracts were sold there; you have them in front of you, I don't know, you have them in your hand. You let me see them, and I will tell you which theatres I was protecting or which pictures.

The Court: Is it necessary to go all over this again? He states here he left out the Novelty. We are now concerned with the question of priority with reference to some of these first three runs over Wallace at the Strand.

Mr. Wright: It is important to show, from our standpoint, what these other theatres were with reference to which he fixed his protection.

The Court: He has already told you, he gave you a list of them. Now he says while it appears to have included the [fol. 4306] Novelty that shouldn't be included.

Mr. Wright: That is what I want to find out, whether there are any other corrections he wants to make.

The Witness: Those are the two theatres. (Referring to contracts). The Novelty appears to have been sold, but wasn't protected. If I protected the Novelty the availability wouldn't be on here until January, February, or March or April.

Q. The Harvard appears here?

A. Yes, sir.

Q. The Harvard admission price was what?

A. 20 cents.

Q. 20 cents evening adults, and children 10 cents?

A. Correct.

Mr. McClennen: Mr. Witness, it is very hard for the stenographer, your not speaking louder.

The Court: You are around the corner there so much. Speak louder.

Q. Then, the price for "Charlie's Aunt" in this contract for the Harvard was what?

A. $27.50.

Q. And the price on "Charlie's Aunt" that you quoted to [fol. 4307] Mr. Wallace was $200?

A. Correct.

Q. And according to your policy notations, Mr. Wallace was to play that at the Strand at a 25-cent evening admission?

A. Correct.

Q. And he was to pay you $200 for playing "Charlie's Aunt" on a 25-cent admission after the Harvard had played the same picture at 20 cents at a $27.50 rental, is that right?

A. Correct.

Q. And setting up——

By the Court:

Q. That difference in price, what was that based on, the difference in the charge or the question of patronage?

A. The difference in the possibility of the theatre grossing. Some theatres can gross $2,000 and another gross $1,000 and another gross $100.

Q. How did the Harvard compare with the Strand?

A. With the Strand, just a fraction of the gross.

Q. The size of the theatre?

A. The size of the theatre?

Q. Yes.

A. Oh, possibly a third, maybe not that much.

Q. Larger, you mean?

[fol. 4308] A. Smaller. Probably it would seat a third or less than the Strand.

Q. How do you account for the difference in the price?

A. In admission?

Q. Yes.

A. Well, Mr. Wallace apparently put an admission on the Strand Theatre with the idea that it would be as cheap an admission as there was uptown, and not having a first-run picture he probably thought that was a suitable price. I don't know why he put a quarter on. The Harvard put 20 cents on because they thought that was a suitable price for a neighborhood theatre.

Q. I mean your charge?

A. Our charge?

Q. Yes, to the Harvard.

A. The cost of the picture?

Q. Yes.

A. The price of pictures are predicated on the gross of the theatre or the possibility of grossing, not on how much admission they charge, not on how many seats they have; it is predicated on the possibility of that theatre grossing.

Q. The grossing would necessarily depend on the size of the theatre?

A. No, the size of the theatre doesn't mean the amount [fol. 4309] the theatre can gross.

Q. That, combined with the charge for admission?

A. Providing they fill their seats, yes, it would have a lot to do with it, but first they have to fill their seats.

Q. They charge so much for the Harvard and so much for the Strand?

A. The Strand is a downtown theatre, one is a neighborhood theatre; one runs all day and the other runs just in the evening.

The Court: I did not understand about that. I did not know about that.

By Mr. Wright:

Q. Now, going back to the Novelty, you had sold the Novelty at the time you made this offer, hadn't you?

A. Yes, sir.

Q. And as far as your contract was concerned, there was nothing to prevent the Novelty from playing these pictures that you had on your offer to Mr. Wallace ahead of the Strand, is that right?

A. There was nothing to prevent them providing he got them in and played it ahead of that particular date; that way he would have played them ahead.

Q. Will you just answer the question; would you read him the question?

[fol. 4310] A. I believe the question you will have to read for me.

(Preceding question read.)

A. That is right.

Q. And the price at which the Novelty played films was the price fixed on this contract, 15 cents for adults evenings?

A. That is correct.

Q. And the rental is $25?

A. Correct.

Q. And as far as Mr. Wallace is concerned, how many theatres played ahead, played these films on your exhibit

No. 157 ahead of him, other than those we have mentioned, depended entirely on when you would happen to make a contract with them, is that right?

A. Well, wait, at the time this was made there was no contract made with the others.

Q. I say, there wasn't anything to prevent you from, as far as the deal, your offer to Wallace was concerned, from selling them all the next day, was there?

A. Nothing to prevent it.

Q. Including the ten-cent houses?

A. Including any theatre if I could sell them the next day, just the question of the element of time.

Q. So that at the time you made him this proposition, and the proposition you made him didn't give him any assurance at all that the films would not play in every house [fol. 4311] in Syracuse except the Empire before he got a chance to play them, is that right?

A. The Empire was the only theatre that came in question on that proposition.

Q. See if you can answer the question? Repeat it.

(Question read.)

Mr. McClennen: I submit the question was answered by the witness.

The Court: I will hear the question.

(Question read again.)

The Witness: That is correct.

Q. And had the Strand ever been sold that way before, as far as you know?

A. As far as I know I don't think I can answer that, because there was too many years elapsed in between the managers that had it, it went through too many hands, I could not answer that. I don't know.

Q. Now, as I understood you, there was no discussion at all of these rentals that are written down on this Exhibit D-157?

A. The only discussion I can recall is the 35 per cent.

Q. Well, would you say there wasn't any other discussion?

A. Not to my knowledge. I can't recall it.

Q. Nothing was said about the amount of rentals at all, is that right?

[fol. 4312] A. No.

Q. That applied, too, to Exhibit 156, and have you the other one over there?

The Court: 158.

Q. Oh, yes, 158.

A. It applies to the three of them.

Q. Now, I notice on Exhibit D-158 you have some red pencil notations there; when were those put on?

A. This was my copy; those were put on after I made the proposition because the pictures were subsequently sold.

Q. Just when were they put on and where?

A. This is my copy. I put these on myself.

Q. I said when?

A. Possibly at the office when I found the pictures had been sold; I could not tell exactly where.

Q. Now, what did you do with these originals, D-158, D-156 and D-157, after you left the Strand Theatre?

A. Put them in my, what we call a "Sales Control Book", pinned to the sheet marked "Strand Theatre".

Q. And took it into the office?

A. No, sir, they are my copies for the next visit to Mr. Wallace.

Q. You didn't make any record in the office at all as to what had happened?

A. Oh, yes.

[fol. 4313] Q. Where is that record?

A. I don't know if I have got it or not. You will find a report with this all on it.

Q. Do you think you can find that for us?

A. Do I think I can find that for you?

Q. Yes.

A. It should be here.

Mr. McClennen: I think it is lying right on the table here, Mr. Wright.

(Document shown to and inspected by Mr. Wright.)

Mr. Wright: Has this been marked?

Mr. Rogers: Yes.

Mr. Wright: Oh, yes.

Q. Is this Exhibit No. 160 for identification, the report that you made?

A. Yes, sir.

Q. And you made that when you got back to the office?
A. I made that when I got back to my hotel.
Q. Then what did you do with it?
A. Mailed it into the office with my weekly reports.
Q. To the branch office?
A. Branch office.
Q. At Albany?
A. At Buffalo.
[fol. 4314] Or at Buffalo, and then you say you kept——
A. I kept that.
Q. That, yourself?
A. For my own personal record.
Q. And when was it you made these notations on here in the red?
A. I can't tell you, some time subsequent to October 3rd.
Q. You don't remember when it was?
A. The date?
Q. Yes.
A. No, there was no particular reason for remembering the date.
Q. You are sure you didn't make it at the time you had the conversation with Wallace?
A. With Wallace, no.

The Court: There is in the evidence one of these exhibits, a latter from the main office in reference to the sale of "The Empress".

Mr. Wright: I beg your Honor's pardon.

The Court: There is amongst the exhibits here one communication purporting to be from the main office with reference to the selling of the "Empress".

Mr. Wright: Selling of the "Empress" or "The Empire Theatre"?

[fol. 4315] The Court: The title of the film "The Empress", there is one in the exhibits.

Mr. Wright: I don't recall it.

The Court: "The Empress" and one other.

Mr. Wright: Such an exhibit, I think the titles of these five are "Charlie's Aunt", "Private Nurse", "Wild Geese Calling", "Sun Valley Serenade" and "Dressed to Kill".

The Court: Probably it isn't there, I thought amongst those 100 exhibits, those last introduced.

[fol. 4316] Mr. McClennen: If your Honor please, I think you have in mind the sale Martina of the "Mad Empress" by Warner's.

The Court: All right. I knew it was in there somewhere. I can't recall where it was. Yes, I guess it was one of the pictures referred to in that same letter. Go ahead, Mr. Wright.

By Mr. Wright:

Q. I call your attention to this notation you made on your report, Defendants' Exhibit D-160 for identification, and ask you if that does not recall to your mind the fact that Mr. Wallace complained about the availibility that you had stipulated in this Exhibit D-156?

A. D-156?

Q. I beg your pardon. In D-157.

A. Well, I said that he objected to the availibility.

Q. And what did you say?

A. That was the availibility.

Q. That nothing could be done about that?

A. No particular thing. When we were making pictures available it was ahead of the Empire Theatre.

Q. Of course, the Empire Theatre never bought any of those pictures, did it?

A. Any of that particular group? I would have to look [fol. 4317] up that and see if they were ever played. I couldn't tell you. They were playing our pictures right along. They may have played some of them and may not.

Mr. Wright: That is all.

Re-direct examination.

By Mr. McClennen:

Q. You spoke about taking into consideration the grossing possibilities in fixing the price to be charged to a theatre.

A. Yes, sir.

Q. Will you state just in what way you take that into consideration when fixing a flat rental?

A. How we take the grossing ability of a theatre into consideration when we fix the flat rental in a picture?

Q. Yes.

A. That all depends on the picture. If it is a top grossing picture we try to figure somewhere around 35 per cent of the gross as flat rental.

The Court: Rather than fixing a percentage?

The Witness: No, you are talking about flat rental now.

Q. In fixing flat rental the witness said they endeavored to arrive at the figure from top grossing figures of 35 per cent of the expected gross; is that correct?

A. That is correct. Take the gross and take 35 per cent [fol. 4318] and try to arrive at a figure at what you rent.

The Court: Wouldn't that depend on the time it was played, even though it was a high quality picture?

The Witness: It is pretty hard to tell when you are fixing the time of a picture when it is going to play. It may be six weeks, it may be two months, it may be six months from that time. It all depends on where you are dealing.

The Court: What do you charge for the first-run?

The Witness: Well, first-run I do not handle.

The Court: I mean the first-run there.

The Witness: I do not handle, I do not make the first-run contracts.

By Mr. McClennen:

Q. Well, is it a usual thing in the sale of pictures that the rentals charged the suburban houses are very much less than rentals charged the down-town houses?

A. The dollar-and-cent-rental, you mean?

Q. Yes.

A. Yes, it is less.

Q. When you gave these prices, the proposed prices, to Mr. Wallace did you believe that they were fair prices for this downtown theatre, as he had described he proposed to operate it?

[fol. 4319] Mr. Wright: If the Court please, I think his belief is immaterial.

The Court: He can state whether that was fair rental.

Q. I ask you that.

A. I would say it was very fair.

Q. Did Mr. Wallace criticize the rental rates, except in this way you spoke of, having the Bingo deducted from the percentage pictures?

A. I can't recall any discussion outside of the 35 per cent due to the playing with Bingo.

Q. Did you say to him—and I am referring to page 2815—"That is the best we can do for you. You know we must protect the Schine account in Syracuse"?

A. Absolutely not.

Q. Did he say to you that your proposal did not constitute a valid offer?

A. If he did I can't recall it.

Q. This being the conversation of October 3 that I am speaking of, a week before your return on the Bingo question. Did he on October 3 say that he rejected the proposals?

A. Well, rejected in the sense that apparently 35 percentage was the obstacle.

Mr. Wright: That is objected to.

The Court: Yes.

[fol. 4320] The Witness: I don't know how else to answer it. He rejected it. He didn't buy it.

The Court: What did he say?

By Mr. McClennen:

Q. What did he say?

The Court: Did he say something about it?

A. The only way I can answer it is he objected to the 35 per cent with his Bingo.

Q. What did you say to him?

A. I said I would discuss that point with Mr. Samson and he made me a counter-proposition.

Q. Was anything more said?

A. Not that I can recall.

Mr. McClennen: That is all.

The Court: That is all.

Mr. Wright: I just want to ask him a question.

The Court: All right, very well.

Re-cross examination.

By Mr. Wright:

Q. When you say you thought those rentals were fair for that situation, did you have some other particular comparable situation in mind?

A. No.

Q. You don't know of any?

[fol. 4321] A. Comparable to that?

Q. Yes, in Syracuse.

A. No.

Q. At the time these offers were made you knew about this lawsuit, didn't you?

A. This lawsuit at the time those offers were made?

Q. Yes.

A. I can't say that I did, no.

Q. Do you know whether you did or not?

A. Well, was it on then? How can there be a suit?

Q. Just answer the question.

A. No, I didn't know.

Q. Did you know then whether there was also a suit against the major film distributors?

A. I did.

Q. You knew about that?

A. Yes, sir.

Mr. Wright: That is all.

The Court: That is all.

ANDREW WILLIAM SMITH, JR., a witness called by and on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. McClennen:

[fol. 4322] Q. Your residence?

A. Greenwich, Connecticut.

Q. Your present position?

A. Eastern Sales Manager for 20th Century-Fox Film Corporation.

Q. When did you come to that position?

A. In July, 1942.

Q. Next prior to that what was your position?

A. Prior to that I was General Sales Manager for RKO-Radio Pictures.

Q. And when did you come to that position?

A. In October, 1939.

Q. And next prior to that what were you?

A. I was General Sales Manager for United Artists' pictures.

Q. And when did you come to that position?

A. In October, 1936.

Q. Next prior to that what was your position?

A. I was General Sales Manager for Warner Bros. pictures.

Q. How long prior to the latter part of 1936 had you been connected with Warner Bros.?

A. I had been connected with Warner Bros. since the year 1928.

Q. When did you enter the distribution of pictures business?

A. In September, 1914.

Q. In what capacity?

[fol. 4323] A. I was a salesman for Pathe, on the Lower East Side of New York City.

Q. How long did you go on in that position?

A. I believe I held that position for about a year and then I became booker in the New York branch office, the office that served the motion picture theatres with their films in the Metropolitan area.

Q. That is, of Pathe?

A. Yes, sir.

Q. Then you went on in that position how long?

A. That was about a year and then I became the Assistant Branch Manager in New York and then went to the Boston office, where I was a salesman, and again a booker, and from there I went to Dallas, Texas, still for Pathe, as Assistant Branch Manager, and then I became Branch Manager in Dallas, Texas. That brought me up to 1918 and after that I again went back with Pathe for a few years, and then in 1924 I became a special sales representative for First National Pictures, and later became Eastern Sales Manager for First National Pictures, and remained with them up to the time that the Company was bought by Warner Bros. in 1928.

Q. And then the position you took with Warner Bros.?

A. I was a District Manager and later a Division Manager and then I became one of two general sales managers [fol. 4324] that Warners had. I became the General Sales Manager for the East in about 1932.

Q. And you continued in that position to the end of your connection with Warners, did you?

A. Yes, sir, July, 1936.

Q. And when you speak of Warners, in those days, technically, you mean Vitagraph?

A. Vitagraph, yes, sir.

Q. That position with Warner-Vitagraph brought you into general familiarity with the way in which contracts were handled as they came into the main office from the various branches?

A. Yes, sir.

Q. As the contracts came in were they given a number?

A. Yes, sir.

Q. And was the listing of them carried out on an abstract of contracts sent in from the branch office when the contract was submitted?

A. Yes, sir. With each separate contract, or with each group of contracts sent in from the branch, there would be an abstract of contract that would come into the home office.

Mr. McClennen: I ask to have this marked for identification.

(Thereupon the abstract of contracts, August 15, 1935, referred to was marked as Defendants' Exhibit D-164 for identification.)

[fol. 4325] The Court: Do you have several of the same kind like that? You better have them all at the same time.

Mr. McClennen: I ask to have this also identified.

(Thereupon the abstract of contracts referred to, December 2, 1935, was marked as Defendants' Exhibit D-165 for identification.)

Q. I show you Defendants' Exhibit D-164, entitled "Abstract of contract, dated August 15, 1935," and call your attention to the column "Contract Number" and on it the numbers 4446 and 4447. What, according to the office system, did those numbers indicate?

A. Those numbers indicated that the first number, 4446, indicated that that was the next contract in line after 4445, to be sent in to the home office by the branch and 4447 would be the next one after 4446.

Q. And were the contracts numbered in the order in which they were received?

A. Approximately, yes, sir. The contracts would be numbered in the branch when they were ready to be sent

in to the home office and then they would be sent in after the number had been put on and the branch would generally send in the contracts just as soon as they were made and as soon as the branch manager was satisfied that the deal was one that he felt was satisfactory for the Company and one that he would recommend.

[fol. 4326] Q. Refreshing your recollection from this Exhibit D-164 of August 15, 1935, will you tell us what No. 4446 was?

A. No. 4446 on this abstract of contract form, dated August 15, 1935, sent in from the Cleveland, Ohio, branch, stated that the contract was for the State Theatre of Bucyrus, Ohio; that it covered 30 Warner Bros. pictures, and stated the amount of money that the contract totaled.

Q. And 4447 was what?

A. 4447 was the same date, the same branch office, Cleveland, Ohio, the same theatre, the State Theatre, Bucyrus, Ohio, and it covered 30 First National pictures and stated the amount of the contract in dollars and cents.

Q. From your knowledge of the system pursued can you tell me whether this Exhibit D-148-A in evidence, having the contract number 4446, and the date July 13, 1935, and the approval date July 23, 1935, signed by the State-Bucyrus Co., M. H. Breyer, Secretary, is the contract there referred to?

A. Yes, sir.

Q. And is the contract, Exhibit D-148-D, No. 4447, signed by the State-Bucyrus Company, M. H. Breyer, Secretary, approved September 5, 1955, the contract there referred to under that number on the abstract of August 15, 1935, Defendants' Exhibit D-164 for identification?

[fol. 4327] A. Yes, sir.

Q. And is this approval stamp "A. W. Smith, Jr.," appearing on each of these contracts, your approval stamp?

A. Yes, sir.

Q. Calling your attention to Exhibits D-165 for identification, abstract of contract, dated December 2, 1935, and the item number 4797; State-Bucyrus, Ohio, the contract marked Plaintiff's Exhibit W-8 (16) for identification, March 26, 1942, signed by Belpik Theatre Corporation, the contract referred to in this abstract of contracts, December 2, 1935?

A. You wish me to identify it?

Q. Bearing the same number. Yes?

A. Yes, sir.

Q. Was the system pursued to have the contracts numbered in the approximate order of the receipt of them?

A. Yes, sir, the contracts, the system was to have the contracts carry consecutive numbers?

The Court: You mean consecutive numbers in the several districts or consecutive numbers of the total?

The Witness: It would be the consecutive number in the order of numbers for the branch. In this case it is the Cleveland branch. It would be contract 4497 for the Cleve-[fol. 4328] land branch.

Q. I notice that this number 4447, August 15, 1935, is 350 numbers earlier than 4797 on the abstract of contracts of December 2, 1935. At that time can you give us any approximation of the length of time in the Cleveland branch that it would take to make 350 contracts?

A. I would say a minimum of three months.

Mr. McClennen: I see that the contract which I described as Plaintiff's Exhibit W-8 (16) for identification, March 26, 1942, has in the present trial in 1944 become Plaintiff's Exhibit 62.

The Court: I was going to ask you about that exhibit because I did not remember any such numbering. The number is what now?

Mr. McClennen: The Plaintiff's Exhibit 62 in this trial.

The Court: All right. That is the exhibit you referred to as W-8 (16).

By Mr. McClennen:

Q. Mr. Smith, when you were in the position that you described from '32 to '36 with Warners, you were familiar with the sales policies prevailing from time to time in the company, were you?

A. Yes, sir.

[fol. 4329] Q. What part did you have to do with examining those sales policies?

A. I was the executive head, sir, of distribution for the eastern half of the United States and had the final say as to policy.

Q. How long had you been familiar with the policies generally pursued by the film distributing companies of the country?

A. Well, that is a rather difficult question to answer, sir. I had practically the—it is the only business I have ever been in, the motion picture business, and I always tried to be a student of it and to acquaint myself with as much of it as I possibly could, not only distribution but exhibition and production. I felt if I could round out my knowledge I could do a better job of distribution.

Q. What did you observe as to the way in which these companies marketed their product, from season to season? I mean what the general course was that was pursued in the marketing of the product by distribution companies? To make it specific, take a season 1933-34, say. Will you describe, in a general way, how the season was projected and the way in which the sellers went to work to get their product on the market?

A. Well, we generally started our plans with a visit to [fol. 4330] the studio. In the group would be our Western Sales Manager, myself as Eastern Sales Manager, and we would have our Advertising Manager, and there would be other people in lesser positions. We would go to the studio and discuss with the head of production. At the particular time I speak of that production head was Jack Warner, one of the three Warner brothers, the youngest one, and he had charge of the Warner Studio at Burbank, California. They had about 75 acres there. They had a real fine studio, and we would get out there and go into conference with him as to what our product for the new season would be.

Q. What time of year are you talking about, in the rough?

A. That would be around the end of January; might be February. And as time went on—it might be December of the previous year—and we would be headed toward a selling season starting September 1.

If we went in January, 1932, we would be headed toward a distributing season which would start December 1, 1932. To differentiate between selling and distributing, the selling generally was started well in advance of the distribution of the pictures for that new season.

Q. And I take it would be in advance of the production [fol. 4331] of those pictures?

A. Yes, sir. We would have our conferences with Jack Warner, as to the stories that he had. He would tell us about any plays that they had bought and he would tell us how much he had to pay for this play or that one, because he bought it in competition with everybody else that was

making pictures, and sometimes we felt that he was paying quite a bit of money for them. And it might be too much. But we didn't say very much about that because the Warner brothers liked to run their business and Jack didn't like too much criticism. I don't think there is any production head out there that does like too much there. They are sort of temperamental. They feel they are doing a great job and they are all wonderful, and they really have made rapid strides.

We are currently in our fiftieth year of motion pictures and it is a far cry from the first ones that we had to the ones we see today.

After we had our sessions with Jack Warner and a line-up with the product he would give us as much information as he could as to stories, as to star in the different pictures, as to the cast in them. He would give us all possible information that would be useful to us in the sale [fol. 4332] of the pictures. We then would be ready for a convention and our convention would take place—it might be in the middle of May. It would generally be before the end of June. And to that convention we would bring our different exchange managers, with the executives of the branch offices.

To give you a little further idea on that: Fox, 20th Century-Fox, has 31 branch offices in the United States. Those are 31 selling and distribution points. Buffalo is one such point. Albany is a distribution point, New Haven, Boston, New York, Philadelphia, Washington, cities such as that.

We would bring our sales organization, branch managers, district managers, and sales managers, in to a central point. At that convention we would tell them about the pictures that were coming along and we would outline the manner in which we wanted them sold, because at all times we were in charge of the sale of those pictures and we had the final say as to policy and as to how our pictures were to be sold to the theatres.

Sometimes we didn't have too much information about a certain picture that Jack Warner was going to make and then we had to use a little imagination and paint a story [fol. 4333] and we tried to create as much honest enthusiasm in our sales staff as we possibly could. We hoped that most of the time that they believed in us and believed in our product and when they didn't there were many of them that would come out and tell you that they didn't.

The sales staff, after the convention, would go back to their respective branches, to the 31 branches, and then they would proceed with the selling of that season's product. They would make their deals and send them in to us for approval.

[fol. 4334] Q. How did you arrive at any method of pricing, and by that I mean the price that you would set to get, after you got some theatres, what were the considerations that led to a determination of that?

A. We attempted always to get a fair price for our product in so far as we were able to determine what a fair price should be. We felt that just like we were in a business, out of which we were trying to make some profits, that the exhibitor, too, should have an opportunity to make profits out of our pictures and in our pricing we had the interests of our customer as well as our own interest in mind, probably our own had a little priority over the customer.

The Court: You had the first cost, the price of the picture to start with?

The Witness: Your Honor, the cost price of a picture is not too great a determining factor.

The Court: The original cost to Warner of a product.

The Witness: I was just going to answer that, your Honor. That cost of the picture is not too great a determining factor in the amount of money a picture should bring in to you, because we generally sell our pictures based on their box office grossing ability, based on their value [fol. 4335] when they play the theatres. We did invest $1,500,000 this past season, 20th Century-Fox did, in a picture called "Life Boat." I don't know whether you saw it or not. It is a story of some people that were marooned on a raft after their ship was struck by a German sub-marine and what happened to it, and a German sub-marine captain got on board and they had a lot of struggles. It was a well made picture, directed by one of the best directors in the business. We had a lot of trouble, because we could not get a proper script on it, that is, they have a script, and they shoot the dialogue in words, and they shoot it from that, and we could not get a satisfactory script. I think we paid about $500,000 before we got into shooting the picture, photographing the picture at all. Sometimes we make mistakes like that. The fact that a picture costs all that money, didn't mean the exhibitor had to pay all that

cost. We sold that picture for what we honestly thought it was worth to every theatre to whom we did sell it. I be- [fol. 4336] lieve we have sold that picture now to about 10,000 accounts. A real good picture like a Betty Grable picture "Coney Island," we will sell that to about fourteen to fifteen thousand accounts in the United States.

By Mr. McClennen:

Q. By the way, around about how many moving picture theatres equipped for sound are there in operation in the United States?

A. I believe in number something in excess of 17,000.

Q. To divert from the course that you were on, after you have got your picture taken on your negative, it is not then ready for distribution until positives are taken?

A. That is quite right. The negative is just like the—did you ever own a Brownie camera?

Q. I don't want to admit anything on that score.

A. The negative is like the negative in a Brownie or Eastman, maybe an Eastman you had. You take your picture with a little camera and that is a negative that is on the little roll. You take it to the drug store and he makes positive prints for you. We do the same thing. We take our motion picture negative and make positive prints from that.

[fols. 4337-4338] Q. And what can you tell us of the cost of making one positive after you have got your negative ready for it?

A. A positive print of a black and white subject costs approximately somewhere in the neighborhood of $185. A color picture costs about three times as much.

Q. In the ordinary run of pictures, leaving aside the poorer ones, if you would be willing to admit you have some poorer ones, and especially good ones, about how many positives do you make of a picture?

A. I believe our average pictures will run about 300 positive prints of an A picture. On an especially good picture we will run as high as 360, 370 prints.

The Court: Does that mean——

The Witness: Those are the positives.

The Court: Those go into your distribution?

The Witness: Yes, those are copies, the positive prints that are sent to our branches, yes.

The Court: I think we will have to adjourn now.

(Whereupon a recess was taken until Friday, November 3rd, 1944, at 10 o'clock.)

[fol. 4339] UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

Civil 223

UNITED STATES OF AMERICA

vs.

SCHINE CHAIN THEATRES, INC., et al., Defendants

Continuation of trial before Honorable John Knight, United States District Judge for the Western District of New York, November 3rd, 1944, 10 o'clock A. M.

Appearances:

Robert L. Wright, Esq., John F. Clagett, Esq., Harold L. Schilz, Esq., Philip Marcus, Esq., Special Assistants to the Attorney General, and Milton Kallis, Esq., Special Attorney, in behalf of the United States.

Edward F. McClennen, Esq., Willard S. McKay, Esq., Saul E. Rogers, Esq., Arthur E. Whittemore, Esq., Arthur J. Homans, Esq., and Edward M. Antevil, Esq., appearing for the Defendants.

[fol. 4340] PROCEEDINGS

(Reporter's Note: Correction, page 3562, line 13, reading "the distributors" should read: "two distributors").

ANDREW WILLIAM SMITH, JR., resumed the stand in behalf of the Defendants, having been previously sworn, was examined and testified further as follows:

Direct examination (Continued).

By Mr. McClennen:

Q. Mr. Smith, you said at the close yesterday that for your "A" pictures you would average to make 300 positive prints. What do you mean by an "A" picture?

A. By an "A" picture I mean a picture that is good enough in box-office values, or has a sufficient amount of box-office value, to play in the best theatre, where there is more than one first-run theatre, and to play—and where the playing time is less than a full week to play during the most productive days of the week which are, in general, Saturday and Sunday.

Q. And if a picture is not an "A" picture how do you denominate it?

A. Generally call it a "B" picture.

Q. And does the classification "B" exhaust the lists of all below the A's?

A. In the general classification, yes.

[fol. 4341] Q. Of your A pictures you say an average of 300 prints. You have said that there were some 17,000 theatres equipped for sound in the United States. In a rough, general, how many of those theatres would you be selling to in a given season?

A. Well, a very good picture would play approximately 14,000 of those theatres.

Q. Then one of your 300 prints would be called upon to serve just a little under 50 theatres?

A. Yes, between 40 and 50.

Q. And service of that print, we will say, to the first theatre, means sending it out from the exchange to the theatre in time to play at the booked time, the number of days that it plays there, its return to the exchange, and inspection before it is ready for its next tour?

A. Yes, sir.

Q. Ordinarily, where the theatre is not in the exchange city, how is that delivery made?

A. Where the theatre is not in the exchange city delivery is made by a common carrier. That might be a trucking service, it might be by bus, it might be by train. It would be made through some common carrier.

Q. What would you reckon to be an average, fair allowance of time per tour, taking into consideration the quick [fol. 4342] deliveries in the same city as the exchange and the distant deliveries in the remoter parts of the exchange area? What should you say was an average time for a tour of duty of one print, assuming that it is two or three days on the tour?

A. That is a rather difficult question to answer, sir. We serve a print over a period of about a year's time. It plays

more during the first 90 days than it does after that and there are some play dates that are subsequent to the year, and after two years' time we take all prints of a subject out of service. Does that answer your question, sir?

Q. Well, the answer can be computed from that, I think, without asking you any further.

A. Yes.

Q. Now, an exchange area throughout the country, as a whole, with your 14,000 theatres to be served out of how many exchanges?

A. Thirty-one.

[fol. 4343] Q. An average area served out of the exchange for those 14,000 theatres would then be in the vicinity of 450 to 500 theatres?

A. Yes, sir.

Q. What is the way that you bring about serving some 450 or 500 theatres with only 10 or less positives?

A. Well, the theatres are served in a sequence of time. We start our picture, the regular procedure of distribution is to first play the larger theatres in the larger cities and towns and play those because those are the theatres that do the biggest business. Those are—sometimes we call a theatre in a large city a show window for that entire exchange territory and in that show window the picture is well advertised; the exhibitor buys space in the newspapers advertising that picture; he many times has a radio program; he has what we call a lobby display; that is, a display in front of his theatre and inside his lobby of scenes from the picture and of special announcements that he gets up and some that we furnish to him.

Q. Now, of your first-run theatres in a given exchange area, am I right that you can start off only 10 crack on the first day?

A. Well, you might possibly start off more by borrowing some prints that weren't working in another territory, but [fol. 4344] that ten would be the normal way to handle it.

Q. In the selection of the first-run theatres to play it is an effort made so that those theatres, those first-run theatres will be chosen in such a way that they are not directly pulling from each other on that particular day?

A. Yes, sir.

Q. Will you state the basis of the competition between the first-run in a given town or competitive area and the

second-run which must come later, if there is any competition between the two?

A. Well, we generally figure that there is a certain amount of money that an individual, we will say the public, has to spend for motion picture entertainment and if we say that that amount of money is $1.00 that they have to spend during a given week, then there is competition for that $1.00 because once that $1.00 is spent by the individual it can't be spent again and the first-run theatre is in competition with the second-run theatre or with any other theatre for that dollar and they want to get it and we want the first-run theatre to get that $1.00 because we can get more money out of that theatre than we can get out of the subsequent-run theatres.

Q. In approximate amounts how much do you figure, [fol. 4345] what percentage do you figure of your revenue comes from the first-run exhibitions as compared with the second and all other runs?

A. I think that figure will run pretty close to 70 per cent.

The Court: Does the answer mean that the second-run would be subject to 70 per cent of the first-run or the first-run would pay 70 per cent?

The Witness: No, your Honor, I mean that 70 per cent of all the money that comes into your company, into a distribution company, will come from those first-run theatres and 30 per cent will come from all other theatres.

By Mr. McClennen:

Q. 30 per cent approximately being the product the second-run, the third-run, fourth-run, fifth-run or any number of subsequent-runs of that picture?

A. Yes, sir.

Q. When did the plan of clearance for the protection of the prior run against the subsequent-run first come into the industry?

A. The plan of clearance came into the industry, I can't name the year, but it was at a time when the motion picture business, we might say, grew up, and instead of having [fol. 4346] motion pictures shown in little stores or barns, or things like that, there was an investment made on the part of some one; an investment in what we call bricks and mortar. A man would buy or lease a piece of property and he would build a theatre, and before he was ready to show

a picture he would have a very substantial investment in that theatre. I imagine that in the beginning a sizable theatre in a medium sized town could be built for between $75,000 and $100,000. In later days there were some theatres having an investment of a million dollars or more and when the man had that kind of an investment he wanted a protection for his investment and he wanted, if there was some other theatre near him and he had this investment, he wanted—he tried to bring about a condition whereby he had first crack at the picture and got to play it before the other man did, if the other man was in a competitive area, and I think that in general would be the start of clearance.

Q. As a matter of time has that method been in operation for upwards of 20 or 25 years past?

A. Yes, sir.

Q. It is obvious that where you sell a picture to a theatre on percentage, that you are directly interested in the amount of the box office receipts of the theatre. Now, will you go [fol. 4347] on from that and tell us in what respect you are interested either at once or for the future in the high grossing possibilities of the theatre as affecting fixed rentals?

A. We use the knowledge we get from playing pictures on percentage in the theatre, at which time we are a partner of the theatre manager. We use the knowledge we get from that to determine what a fair price will be for a flat rental picture. If we have to—there are certain things we have to know before we can determine that, and we get as much knowledge as we possibly can before us and then proceed to determine a flat rental price. That flat rental price of necessity is based on the amount of dollars, the number of dollars that the theatre takes in on a flat rental picture, just the same as it is on a percentage picture, and the exhibitor, if we ask an exhibitor to pay us $200 as a flat rental price, with all the factors before us, we believe that $200 is a fair price, and if he plays the picture and comes to us and says "Now, look, this $200 was too much. I lost money when I played the picture", it is a custom of our company and a custom of the industry to listen to that man and in many, many instances reduce the flat rental price to the point where he can at least break even or show a small profit.

[fol. 4348] Q. That adjustment being made after he has played the picture?

A. Yes, sir.

Q. When you come to fixing the flat rental price which

you are willing to take on a new operation of a theatre, where you haven't a past experience with that exhibitor and that operation, what are the elements that you take into consideration in determining that price?

A. Well, again, we would endeavor to estimate how much money that theatre could gross. We would probably ask the theatre man what his expenses were. He might tell us and he might not. Some of them are rather peculiar that way. They don't like to tell you too much about their expenses and sometimes when they give you a figure it isn't as correct as it might be, but we do as good a job as we can to estimate what the gross on the picture will be and from that we arrive at a fair film rental and then when our pictures start playing that theatre—now, sir, as you know, we sell pictures only in small groups.

Q. In all the questions I put to you please assume that we are talking about a period before 1940.

A. Oh, yes.

Q. On these general descriptions.

A. In the case of a new operation, such as that, the procedure would be to sell a limited number of pictures and [fol. 4349] then to, what we call, to check the box-office of a theatre during the time that the picture was playing. By checking the box-office of a theatre I mean have a man there who would stand in front of the theatre with a clock and every time a person would go in the theatre he would press a little button and that would register an admission. He would do that for everybody he saw go in the theatre. Some might go in the back way and he might miss them, but your check is generally pretty accurate, and knowing what the man's admission price is we can compute how much business that he did on our picture, and from that point on we don't have to guess. We know the figure.

Q. If you have a theatre in a down-town city district, running a normally successful operation, with, say, three-a-day, that is, a matinee and an early evening and a late evening, and have the number of seats—take for illustration 1600 seats in the house—in the estimating in the industry how many admissions during the course of the day, taking the three times into consideration, is it figured that those seats will be filled? That is, whether it is once or less than once, on the average, or twice, or once and a half, or what?

A. We customarily figure so that a theatre operating, as [fol. 4350] you say, in a down-town section of a city, will

have one full house during three shows. That means if a theatre has 1600 seats that there will be 1600 admissions sold during the three performances, where the possibilities would be three times 1600 or 4800.

Q. So that on the figures assumed you would get, if it was a 25-cent house, $400 a day in box-office returns?

A. Yes, sir, if 25 cents was the average price. There might be a differential between matinee and evening price but if 25 cents was the average price that is what it would be.

Q. And for four days you would have, on that basis, a matter of $1600?

A. Yes, sir.

Q. You say your effort on your A pictures is to get 35 per cent of the box office receipts?

A. Yes, sir.

The Court: Are most of the A pictures let on a percentage basis?

The Witness: Yes, sir.

Q. So that if there was nothing more to be said your $1600 would make an asking price of something like $550?

A. For a flat rental picture?

Q. For a flat rental picture.

A. Yes, sir.

[fol. 4351] Q. Do you remember "Sun Valley Serenade" that Fox brought out in the '41-'42 season?

A. Yes, sir.

Q. What grade of picture was that?

A. That was an A picture.

Q. We have been speaking so far of first-run pictures, first-run theatres. Is this 35 per cent that you speak of a mark that you aim at in second and subsequent runs also?

A. Yes, sir.

Q. There is one element still to be considered. Suppose you have "Sun Valley Serenade" at 35 per cent and are aware of the fact that in order to get in the $1600 imagined you have to have a second feature, or vaudeville or bingo, or some other attraction. What part does that play in your arriving at your figures? Do you make allowance against the gross for the cost of those things or how do you get so that you are getting only 35 per cent of what is fairly attributable to your picture?

A. Where a theatre plays or operates on a double-feature program, playing two feature pictures on the same program,

or where a theatre has some other form of entertainment that is played with the feature picture, such as bingo, which many theatres used to have, and that has been ruled illegal, [fol. 4352] I believe, in most States now, the custom is to allow a deduction from the total receipts of the theatre during the time the picture in question has played, allow a deduction from the total number of dollars that come in at the box office. The deduction in the case of a second feature would, in general, be the actual cost, the actual amount of film rental that the theatre paid for that second feature. In the case of an attraction, some other attraction, you follow the same procedure. In general it would be the actual cost of that attraction and that sum of money would be deducted from the total number of dollars the theatre took in while the feature was playing and then we would get our 35 per cent of the remainder.

Q. In the suppositious pictures I put before you, before we get to the $550, there would have to be these deductions you have just mentioned?

A. Yes, from the total sum of $1600 there would be a deduction.

The Court: That would not contemplate a playing of two so-called A pictures at the same time, would it?

The Witness: The theatre would have to make an awfully good buy on one of those two pictures, your Honor, to be [fol. 4353] able to play two A pictures on the same program. They would have to have a deal on that picture that would permit that. If they were playing two A pictures and they were both 35 per cent pictures, if we let them deduct 35 per cent of the gross on the second picture, there wouldn't be much left for the other.

The Court: They wouldn't ordinarily do that?

The Witness: No, sir.

By Mr. McClennen:

Q. With your knowledge of the business, on the figures you have just stated, if you assumed that the Strand Theatre in Syracuse had upwards of 1600 seats and was to open up at an admission price of 25 cents and was to play for four days and was to play "Sun Valley Serenade" in the fall of 1941 at $200 a.g.; 35 per cent for four days—I am reading from Defendants' Exhibit D-157—first let me ask you what that expression means in the trade, $200 a.g. 35 per cent four days"?

A. That means $200 against 35 per cent of the gross. It means that we are to get 35 per cent of the gross of the theatre during the time it plays that picture but in no event [fol. 4354] less than $200.

Q. On the assumptions I have just made, in your experienced opinion, what would be a reasonable guarantee figure in the business sense for such a picture?

Mr. Wright: If the Court please, that is objected to. This witness has not given any testimony which demonstrates qualifications to make this particular judgment. I submit that if anybody is going to come here and say whether or not that particular offer was reasonable it ought to be somebody who knew what the Syracuse situation was at the time, who would be doing business with those theatres. This witness, I believe, was not even with the Fox Company at the time that that deal was made. There hasn't been any showing that he knew what the conditions in Syracuse were at that time, what runs what theatres played, what the policy of that particular theatre was, or what the other theatres in Syracuse did, and he hasn't any basis at all for estimating what the gross receipts that might be expected [fol. 4355] from that particular theatre and that particular picture were at that time, or would be, and in the absence of any such knowledge it is obviously incompetent to tell correctly what a proper price would be.

[fol. 4356] The Court: Is the question based on the assumption there will be a certain amount of gross in the town? Is the inquiry based on the assumption of a certain amount of gross?

Mr. McClennen: Yes, if your Honor please.

The Court: A gross of $1600?

Mr. McClennen: A gross of $1600, and so far as the argument in opposition is concerned, we have already done that part; we have shown by the evidence of the experienced man Rowell, with 25 years' experience, of Syracuse, that this is a fair price. Now, so far as an expert in this industry is concerned, if the United States can bring a more qualified man than Mr. Smith to testify, we await that event, one of the most experienced men in the industry dealing with this subject, and this is not asking him more than just the expert witness' opinion.

The Court: Let me understand it, because I do not under-

stand it. Is this question as to the proper charge based upon the gross of $1600?

[fol. 4357] Mr. McClennen: It is based on these facts that were at hand when this figure was arrived at as set out in Defendants' Exhibit D-157, October 3rd, 1941; these facts are the experiences in the industry as to what can be expected ordinarily in a theatre and based upon a seating capacity of 1600 seats, and the policy stated to Mr. Rowell of 25 cents admission. Those are definite factors in the situation, and now I am asking this witness what, in his opinion, would be, in the business sense, a fair guarantee figure to have in the offer under those circumstances.

The Court: Well, under just what circumstances?

Mr. McClennen: A downtown theatre in Syracuse, with over 1600 seats, and an exhibitor proposing to operate that theatre at a 25-cent admission and to run Bingo as an attraction and the picture up for consideration being such a picture as "Sun Valley Serenade" has been described to be in the season 1941-42. Those are the known definite elements which I assume.

Mr. Wright: If the Court please, on his own statement, [fol. 4358] the question there eliminates a number of elements that were then known and which this witness isn't shown to have known anything about,—to-wit: the operating policies and admission prices and rentals paid by other theatres in the City of Syracuse. Now, this——

The Court: He is assuming and is anticipating that a certain policy and admission price,—the question of 25 cents for the average time.

Mr. Wright: I said with respect to other theatres. There is nothing in the—there is no question about the fact that at the time this offer was made the man who made it was familiar with the price policies of the other theatres in Syracuse and the time when they played or would play these pictures with reference to the play at the Strand Theatre. Those are, of course, necessary factors which had to be considered in determining what price the Strand ought to pay, and they have been completely omitted from the question and they are, of course, factors about which [fol. 4359] this witness hasn't testified that he knows anything.

The Court: You spoke about Bingo. Now, does this question contemplate an allowance for Bingo in the price at the time?

Mr. McClennen: It contemplates that an allowance would be made for Bingo following the course which the witness has described and which the Witness Rowell described.

The Court: The fundamental—or the difficulty seems to be that we cannot tell what the income would be or the gross would be, without the benefit of different circumstances being assured. Of course, the evidence so far—there is evidence so far, of course, showing the basis of the charge, based upon a certain amount of income per year. Now, if you assume that in three days this theatre had an income in gross of $1600——

Mr. McClennen: Four days.

The Court: Four days, whatever the period might be, and some definite amounts were deducted for Bingo, then he is in a position to state whether that is a reasonable charge based on such a gross.

Mr. Wright: I might make the further objection that [fol. 4360] there is no showing at all that Rowell made any offer with reference to any Bingo allowance. The offer as made by him, and written out, did not include any statement with reference to Bingo whatsoever. There was no such offer made. The offer was as written there to pay these certain percentages and rentals.

The Court: There was testimony that it played Bingo there.

Mr. Wright: The policy—have you got the exhibit that has the policy written on it?

Mr. McClennen: The policy appears there as, that when Bingo was played the admission price was to be 50 cents.

Mr. Wright: The statement as to policies that Mr. Rowell had when he made out the offer simply said "Tuesday and Friday Evenings, Bingo, $650, Adults 50 cents net," and he then wrote out the offer and there was no allowance offered for any picture on such nights, as Bingo might play. If it played on Monday or played on Saturday, Sunday, Monday or Wednesday and Thursday, Bingo wouldn't figure in the offer at all.

[fol. 4361] Mr. McClennen: Perhaps I might put a preliminary question to the witness.

By Mr. McClennen:

Q. In the period when Bingo was being played in the theatres, can you tell me whether or not where it was only intermittently played, whether the Bingo nights were

usually the slack nights of the week rather than the nights when a prominent striking picture was to be played?

A. In general Bingo was played during the nights that up to that time had not been producing much in the way of revenue and, in an effort to try and get more money into the box office, the exhibitor had a Bingo game or something else to help out.

Q. I will ask you to assume this also, that the salesman making the proposition said at page 4286 "Well, in relation to the counter proposition, or, that is the proposition of the percentage pictures with Bingo and his counter proposition, I made him another proposition in which I offered to permit him to deduct the difference between the Bingo admission and the regular admission before computing the percentage." Now——

Mr. Wright: Of course, just a minute, what counsel is reading from is testimony given with reference to a later [fol. 4362] conversation on October 10th.

Mr. McClennen: If you will let me finish the question, it will appear. Mr. Stenographer, will yo upick up before the interruption and give me the latter part of what I was saying?

(Latter part of preceding question read.)

Q. Now, I want to assume also that that proposition was made a week later and that at the time that the original proposition, D-157 Exhibit was made, there had been no suggestion made to Mr. Rowell that Bingo was to be played on the same night as "Sun Valley Serenade." Now, adding those things to the question, I ask you what, in your opinion, would be a fair business-like price to state against 35 per cent on such a picture as "Sun Valley Serenade"?

Mr. Wright: It still, if your Honor please, does not appear that this witness knew any factors which are obviously of importance in determining what a fair price would be: (1) What that theatre had paid for pictures before; (2) What other theatres in that town paid, what policy they played on with respect to runs and admission price and [fol. 4363] what, if any comparable situations there were to the one that was being then sold. There hasn't been any showing.

The Court: As I pointed out in the first place, I don't see how any one can make an estimate of the proper price

in a theatre unless he was advised in reference to certain factors; that the largest thing and the important thing would be that he knew what the attendance was, what it would ordinarily be. Now, if you say you assume here an attendance of 1600 were going to see the show or the picture, then, of course, the witness may say what is the proper charge for a picture to be displayed to such a capacity house. Again there is nothing to show here, in your assumption, the amount deducted for Bingo. Of course, you say the Bingo levels off the period of the whole week so that the average would be for the week or the period of the show. Of course, if you take that into consideration in estimating the amount the purchaser pays, then it would be competent. On the other hand, does it appear when this show was [fol. 4364] showed, what time it was showed.

Mr. McClennen: This proposition was not accepted.

The Court: No, no. What dates were fixed? Were dates fixed?

Mr. McClennen: This proposition was made on October 3rd, 1941.

The Court: There were no dates then fixed, Friday, Saturday or Sunday, or Saturday, Sunday and Monday?

Mr. McClennen: The dates fixed in the proposition are Saturday, Sunday, Monday and Tuesday, and then further that "Sun Valley Serenade" and "Dressed to Kill" were to be played on the same bill, and that the proposal of "Dressed to Kill" was a flat rental of $100.

The Court: You see, again, that is another factor that seems to me makes the inquiry more speculative. If he knows the basis for it then he can say what a proper charge would be.

Mr. McClennen: If your Honor please, if I might rest there, I will ask Mr. Smith:

Q. Will you assume, also, the elements that his Honor has just mentioned and state what, in your opinion, would [fol. 4365] be a fair bottom price on such a picture as "Sun Valley Serenade" when dealing with a situation of a theatre that had had only 12 days' experience in running as a new operation at that time?

Mr. Wright: If the Court please, the question is now, it seems to me, completely unintelligible and pure argument in any event and still omits factors which would necessarily have been taken into account in determining any fair rental,

to-wit: the number of theatres which would play the same pictures ahead of this theatre and the prices at which they would play at the period of time during which they would exhibit them.

The Court: There is considerable merit in what you say, but there is some testimony directed to the same proposition. I think the confusion is overcome, perhaps, by adding what I suggested, but there are so many factors entering into this question; now, if you knew what the gross from the house was, the answer would be simple. Now, the question is assuming that there is a gross of $1600 for the four days of the show, over which this film will be showed. Then [fol. 4366] I think the witness is competent to answer what would be a fair charge for the service.

Mr. Wright: Of course, the witness has already testified it isn't customary to assume a gross where they have a new operation. They run some pictures and check them and find out what the gross is.

The Court: If there is no basis for it, of course, it wouldn't count much, but taking that assumption, assuming this house grossed $1600 during the period of this film, then what would be a proper charge, and I think you can go farther than that and state if there is Bingo.

Mr. McClennen: That is the assumption I make.

Q. Mr. Smith, what would be a proper——

A. In my opinion a proper rental, if we were to deal on a percentage basis, would be 35 per cent of the gross. It was estimated it would do $1600. After taking from that gross $100 paid for the second feature "Dressed to Kill," then you have 35 per cent of $1500, and in arriving at the flat rental, 35 per cent of the gross of $1500 as a flat rental, maybe shading that a little bit, because you are estimating and you don't know whether you are right or wrong, and [fol. 4367] when a man pays a flat sum, that is a guarantee and the money goes to you; you are not sharing in what comes in in that case, and he is entitled to a figure that would be less than 35 per cent of the estimated gross.

Q. Then, if it was $1600, you would take away $100 for the second feature?

A. Yes, sir.

Q. Making it $1500; then if there was no Bingo your answer amounts to saying 35/100 of $1500?

A. Yes, sir.

Q. And if there was to be deducted, not Bingo at cost, but instead the difference in the admission price when Bingo was played over what that admission price was when Bingo was not played and the percentage were figured only on the balance of the $1600 which came from the 25-cent admission, by which the $1600 had been arrived at, your figure would still be 35 per cent of $1500?

A. Yes, sir.

The Court: In other words, you are figuring on a gross of the same amount, I mean, the average right through the same?

The Witness: Yes.

The Court: That the attendance would level off the gross in estimating your percentage?

The Witness: Yes.

[fol. 4368] The Court: I mean by that your statement relates to the inquiry where a charge of 50 cents is made, that might fall down to 25 cents certain dates, and that is made up on the bingo nights, so the average would be $1600 gross?

The Witness: Yes, sir.

By Mr. McClennen:

Q. Mr. Smith, in determining your sales policy——

The Court: Just one question. Let me ask you: What is the name of the picture you referred to?

Mr. McClennen: "Sun Valley Serenade."

The Court: Where was that played in Syracuse?

The Witness: I don't know, sir. As Mr. Wright pointed out, I was not with the Company at the time that picture was put into release. I did see the picture when I joined the Company. It is a Sonja Henie picture.

The Court: The question is where it was played and what the charge was.

Mr. McClennen: I think from contracts not yet in evidence we will be able to answer that in a moment. I don't recall that the testimony shows.

Mr. Wright: We have the contract that shows where it played.

The Court: I forgot what that was.

[fol. 4369] Mr. Wright: We put in the contracts for all of the theatres in Syracuse that played the picture, with one exception.

The Court: The point of my inquiry was: What percentage does that show?

Mr. McClennen: Those are the contracts I told you we were sending for, if your Honor please, to show what the runs were.

Mr. Wright: We have the contracts in evidence.

The Court: What does that show?

Mr. Wright: The contract for the first-run shows "Sun Valley Serenade" sold first-run, Syracuse, to the Paramount, Strand, Keith or Eckel, a contract dated August 8, 1941, with S.K.E. Operating Corporation, "Sun Valley Serenade" to play the Keith or Paramount seven days, no guaranteed minimum license fee, distributor's fee on the gross receipts 35 per cent.

The next contract was between the same parties and the same date, which is Exhibit 964, provides for a moveover to be played at the Eckel Theatre, with no minimum guaranteed license fee, to play seven days. The distributor's [fol. 4370] share of the gross receipts 25 per cent.

The second-run contract has not yet been produced.

By the way, has that been received yet?

Mr. McKay: No.

The Court: What was the name of that?

Mr. Wright: The Eckel.

The Court: Was that a down-town theatre?

Mr. Wright: Yes. The Eckel Theatre and Paramount were all operated by the Schine-RKO pool.

Mr. McClennen: These two contracts, if your Honor please, are Exhibits 963 and 964, which were approved 11 days after this offer was made by Mr. Rowell to Mr. Wallace.

Mr. Wright: The approval date does not appear here.

Mr. McClennen: The approval date appears stenciled in at the signature as 10-14-41.

Mr. Wright: Well, this is the approval date here, 10-14-41.

The Court: What significance has the approval date?

Mr. McClennen: Because there was no contract in existence up to the time of the approval date, October 14, 1941.

The Court: For this film?

Mr. McClennen: For this picture, to any theatre.

Mr. Wright: Well, if the Court please, there was an appli- [fol. 4371] cation on August 8, 1941, which set forth these terms, and which was ultimately approved. There is no question about what had been done prior to October 3rd.

The Court: What was the theatre after that?

Mr. Wright: The second-run theatre was the Regent, for which we don't have the contract.

The third-run theatre was the Cameo, and I believe the contract is here. Yes, that is application date September 12, 1941, and is signed by Herman Lauber. If it has an approval date on it I don't know where it is.

The Court: What are the terms?

Mr. McClennen: It hasn't in terms any approval date, but I rather suspect this date up here, September 25, 1941, is the approval date on Exhibit 965.

Mr. Wright: I suppose that probably is too.

Mr. McClennen: There is a stamp up there "September 25, 1941."

The Court: What are the terms?

Mr. Wright: The terms are on "Sun Valley Serenade," a minimum guarantee of $100, and the distributor's share [fol. 4372] in gross receipts is 35 per cent. The exhibitor is given the privilege of deducting the cost of the second feature, not to exceed the price of exhibitor's bottom flat from gross receipts of 201 and 205, before computing distributor's share. It is "Sun Valley Serenade."

The Court: Is this the Cameo?

Mr. Wright: This is the third-run, yes.

The Court: What is the capacity of that theatre?

Mr. Wright: It doesn't appear from the contract.

The Court Is that a suburban of down-town theatre?

Mr. Wright: I am not sure whether it is down-town or not, but it was the third-run. The witness Rowell testified it was the exclusive third-run in Syracuse.

The Court: I suppose the amount depends on the class of house.

Mr. Wright: I would assume so. I would assume it would also depend on the admission prices charged and the period when the picture played and how much of the customer's dollar had been taken out in the course of prior engagements at other theatres.

The Court: Ordinarily charge rent after the first showing?

[fol. 4373] Mr. Wright: Ordinarily the rentals would decrease with the age of the picture.

The Court: Proceed then.

Mr. McClennen: It does not appear in evidence the Cameo Theatre was in fact a neighborhood house running nights

only. It does not, of course, appear in evidence the returns which the distributors received on those 35 per cent contracts from those other theatres, so I am not in position to state those figures to you.

The Court: I do not recall. You say there is nothing in the evidence to show the location of the Cameo. Certain of these theatres are outside of the business district center.

Mr. McClennen: I am not sure enough of its being in evidence to assert it. It seems to me it was, in general, stated that we have heard these other names of the downtown theatres and the rest were neighborhood houses, but I can't remember at the moment the Cameo having been mentioned.

The Court: We will find out later.

[fol. 4374] By Mr. McClennen:

Q. I notice in Mr. Wright's remarks to the Court just now the assertion that the percentage should go down as the runs progressed onward or downward, as you may call them. Does that affect at all your testimony to the contrary, given this morning, that the effort was to obtain the same percentage of gross receipts from the later runs as from the earlier?

A. No, sir.

The Court: You mean by that the effort was to obtain the same percentage?

The Witness: Yes, your Honor.

The Court: Same percentage of each run?

The Witness: Of each run.

By Mr. McClennen:

Q. Mr. Smith, have you any approximate information as to the number of the approximately 17,000 theatres you have spoken of in the country that are situated in towns or cities where there is only the one theatre to which you can sell?

A. I don't have any knowledge of that, sir.

Q. When a theatre is the only theatre in the town what is the sales effort that you make directed against? That is, what competition for that business?

A. Where there is only one theatre we are in competition [fol. 4375] for the sale of our product with at least nine

other companies—do you wish me to name the companies, sir?

Q. You may as well, and I am asking this as of some time prior to 1940, so include your own company, making ten, and name the list.

A. I will start with the best company, 20th Century-Fox, and Paramount, Metro-Goldwyn-Mayer, Warner Bros, RKO, Universal, Columbia, Monogram and Republic.

Q. I counted only nine there. Did you mention United Artists?

A. United Artists. I did not mention it.

Q. Under those circumstances do you find it necessary to attune your prices so as to see that you get the business, if possible, as against the nine others?

A. Yes, sir.

Q. When you have a place where there is more than one theatre and the two or more theatres are in operation of disconnected parties, in exercising your desire to select your customer, as between the two or more, what are the elements that you take into consideration in, let me say, the years 1932 to the beginning of the year 1940?

A. In selecting a customer for our product in a competitive area during that period of time we would take into consideration the ability of the customer to gross. We [fol. 4376] would want to know how much money one theatre could be expected to do on a certain picture as against the amount that the other theatre would be expected to do. We would try and arrive at that estimate, if we didn't have figures. Then we would take into consideration the operation of the theatre, the people who were conducting that business. We would try to find the more substantial business man of the two. We would take into consideration the theatre itself. We, of course, like to play our pictures in the nicest theatre, a theatre that has comfortable seats, a theatre that shows a good clear picture on the screen, a theatre that is well-ventilated and well-managed all the way through. We would prefer to have our pictures play in that type of theatre. If the admission price of one theatre was higher than the admission price of the other we would, in general, desire to play our picture in the theatre charging the higher admission price.

Those would be some of the factors. There would be others too.

Q. In determining whether or not you will sell a second-run in that town, or in that competitive area, or any later runs, what are the elements that you take into consideration?

[fol. 4377] A. In selecting a second-run in a competitve area we take into consideration, first, a protection of the film rental that we expect to get out of the first-run. Before we select a second-run theatre we make sure that the operation of that theatre and the playing of our picture there will not harm the possibility of that picture during its full amount of business, the full amount of business it is capable of doing at the first-run house.

We take into consideration also the same elements that we take into consideration for the first-run theatre, the condition of the house itself, the projection, sound, ventilation, and so forth.

We take into consideration the location of the house. If there is a house in an area that is on a busy corner, or is located where more people are closer to the theatre, we like to play that house, rather than one that is around the corner and off the beaten path.

Q. Will you describe the terms "hold-over", "carry-over" or "move-over"? As they are used in the trade.

A. The term "hold-over" means continuing the engagement of a picture for more than the contracted number of days in the same theatre. For instance, in Buffalo, we generally contract for a picture to play seven days at the [fol. 4378] Great Lakes Theatre. If the picture does a very substantial amount of business it is the custom of the Great Lakes Theatre to hold that picture over for an additional seven days and that would be a "hold-over".

Sometimes they hold a picture over for a third week and then you have 14 days "hold-over".

A "carry-over" and "move-over" is moving the picture over or carrying it over to another theatre in the same city, in the same competitive area, another first-run theatre.

Carry-overs and move-overs are continuation of the first-run and they are in the theatres that are owned, or theatres in which the first-run theatre has an investment.

Q. Where there is either a "hold-over", a "carry-over" or a "move-over", is the entire operation still treated as the first-run?

A. Yes, sir, including the admission price, which remains the same throughout the entire run.

Q. When you sell a picture—and, by the way, that term "sell" is the one regularly used in the trade to describe your licensing a picture for exhibition?

A. Yes, sir. We don't really sell the picture to the theatre. We deliver it to the theatre for a contract engage-
[fol. 4379] ment and then we get that picture back.

Q. When you license a picture to a theatre on a percentage of the gross receipts how do you know how to bill a theatre?

A. The theatre prepares a box-office statement. They prepare the figures daily. That box-office statement shows the number of admissions sold at each performance during the day and the price at which those admissions were sold. Then at the conclusion of the engagement we have a statement of the entire run of the picture and sometimes we check the theatre. We have a checker at the box office and we compare our count with the report that the theatre gives us. Sometimes there is a slight discrepancy between the two figures.

Q. Are those percentage reports ordinarily signed by the man who operates the theatre at the time that the percentage picture played?

A. They are signed by the man who is operating the theatre or his theatre manager, or some one from his company.

Q. And those reports, when they come in, if they haven't been tested, checked, or otherwise shown to be erroneous, are taken as the basis for billing the theatre for the rental of that picture?

A. Yes, sir.

The Court: We will suspend for five minutes.

(Short recess taken.)

[fol. 4380] Mr. McClennen: I am told, and I am not sure that it is in evidence, that "Sun Valley Serenade" was played at the Keith from September 18th to 24th, seven days, and that at the Eckel, September 25th to October 1, seven days.

Mr. Wright: If the Court please, if we are going to have evidence on this, I suppose we ought to have it introduced in the usual way. There are playoff records which I suppose will show all the rentals received.

Mr. McClennen: I did not suppose there was any question about it and I withdraw my remark.

Mr. Wright: I think we ought to know what they received.

Mr. McClennen: I said I didn't suppose there was any question about it and I withdraw my remark.

By Mr. McClennen:

Q. Since you have come to the head-ship of this sales department of Fox, have you had occasion to familiarize yourself with the policies that were prevailing with the Company in the period prior to your coming there?

A. Yes, sir.

Q. I confine this question which I am about to put to you to your personal knowledge, not what you have been told [fol. 4381] by anybody else; to your knowledge has there been any conversation with any of the defendants or their executives or employees not to deal with any competing exhibitor or to restrict the terms of such dealings?

Mr. Wright: If the Court please, that question isn't one that could be properly answered in my opinion by any witness, least of all this one who is now giving testimony. That would be purely hearsay in any event, what came to his attention with respect to the prior policy of the Fox Company, and certainly isn't competent evidence on any issues that we are trying here.

The Court: He was the manager of the company.

Mr. Wright: He was asked about, as I understand it, the policy with respect to the period before he came with the company, if I understood the question correctly.

Mr. McClennen: This question is not directed to the Fox Company. It is directed to his personal knowledge and was prefaced by a warning that he should not go outside of his personal knowledge. This man has been a head in the sales department of Warner, R.K.O. and United Artists during [fol. 4382] the periods involved in this case, that is, from 1932 to 1942. He did not come to the head-ship of Fox until after the date that has been selected as terminal, May 19th, 1942.

The Court: Well, at least your question should be limited to the companies with which he was employed. I don't think he can answer the question generally as to all the companies.

Mr. McClennen: If your Honor please, he might have

been present at a conference at which he heard some defendant say something to somebody else. I am clearing the way of his knowledge.

The Court: That is too indefinite for a denial of the charge. How can the plaintiff seek to show the contrary?

Mr. McClennen: If there was nothing, he will answer "No", and if there was something then it becomes important to find out what that is.

The Court: Suppose he answers "No"; what position would the plaintiff be in to show the contrary of that in every company?

Mr. McClennen: I am asking him only his own personal knowledge.

[fol. 4383] The Court: I will disallow it except you show the companies.

Mr. Wright: If the Court please, even as to that it would be objectionable as calling for a conclusion. What he ought to state, if he is going to state anything, is what negotiations he had with the defendants here, what was said during the course of these negotiations. It doesn't appear yet whether he participated in them, or whether he participated at all. All that would have to appear there to be any foundation for this question now being asked.

The Court: Mr. Smith, in his position, it seems to me his relations with these companies since 1932 is such he had some contact with those making licensing agreements.

Mr. McClennen: I am not asking——

Mr. Wright: The extent of the contacts, who they were with, when they occurred, where they took place is something he isn't informing us about at all. I submit before he is given an opportunity to draw any general conclusions, such as he is asked to draw here, there ought to be testimony [fol. 4384] at least fixing the scope of these matters he is talking about.

Mr. McClennen: I am not asking him for any conclusions whatever. I am asking him for the plain facts.

The Court: Well, it is the same question we had some time ago, the question of whether any threats were made of that nature. Just read the question there.

(Question read, as follows: "Q. I confine this question which I am about to put to you to your personal knowledge, not what you have been told by anybody else; to your knowledge has there been any conversation with any of the de-

fendants or their executives or employees not to deal with any competiting exhibitor or to restrict the terms of such dealings?")

Mr. Wright: That plainly calls for a conclusion as to what the nature of the conversations were, if any, the kind of a conclusion that your Honor has got to draw ultimately in this case from the evidence that is offered as to what the actual course of dealings was. It isn't for this witness to [fol. 4385] state that conclusion himself with no opportunity on our part to know what these conversations were that he is basing this conclusion upon.

The Court: When you use the word "Conversation", I suppose if there was any statement made in those respects——

Mr. McClennen: Yes, if your Honor please.

Mr. Wright: It isn't so much merely a question of a statement made, it is the way the statements——

The Court: I am construing the statement, that is all. I think I will receive it. It is not a trial by jury, and if necessary or advisable I will strike it out.

The Witness: The answer is "No, sir".

Mr. McClennen: That is the end of the direct examination.

Cross-examination.

By Mr. Wright:

Q. Mr. Smith, you testified quite generally with respect to the policies and practices and the methods of distribution employed by these companies with which you were associated. Is your testimony the same as to all of them?

A. In general, yes, sir.

[fol. 4386] Q. All, United Artists, R.K.O., Warner and Fox, all use the same method of distribution?

A. No, sir.

Q. What are the differences, if any?

A. Well, every company has its own. Each company that I have been with has had its own policy, and there is no standard set of policies for distribution companies that I have ever heard. All the policies in the companies I have been with have been made as conditions developed. Selling policy for one season's product in the same company might change. The motion picture business is a very timely busi-

ness and decisions are made quickly, and you have to anticipate things. I don't know of any standard set of rules.

Q. It is your testimony then there wasn't any uniform selling policy as between these companies you have been associated with, is that right?

A. Yes, sir.

Q. There were also some differences in actual methods of sale and distribution, were there not?

A. Yes, sir.

Q. That is, United Artists would sell pictures of the smaller groups?

A. Yes, United Artists was quite different from any of the others. That company was owned by—there were five [fol. 4387] shares of stock only in that company. One share was owned by Mary Pickford, one by Charlie Chaplin; one by Alexander Cordeau of England; one by the ex-deceased Douglas Fairbanks—that four.

Q. And the company itself was engaged just in distributing films?

A. Yes, it was a separate distribution company that distributed the pictures made by United Artists companies. United Artists, they were independent producing units, such as Sam Goldwyn. Sam Goldwyn made pictures for distribution through United Artists. David Selznick made pictures for distribution by them. Sam Goldwyn owned the fifth share of stock.

The Court: What?

The Witness: He owned the fifth share of stock.

The Court: You said here United Artists were not a producing company; what I understood you to say was individuals produced pictures for them to sell?

The Witness: Yes, sir.

By Mr. Wright:

Q. United Artists owns no theatres and has no theatre affiliates?

A. That is correct.

Q. And didn't have while you were associated with them? [fol. 4388] A. That is correct.

Q. On the other hand, R.K.O. and Fox and Warner companies all have theatre operating affiliates, isn't that right?

A. Yes, sir.

Q. Now, at the time you entered the industry, that was when?

A. 1914.

Q. 1914?

A. Yes, sir.

Q. At that time there were a great many more pictures being produced than now, were there not?

A. In 1914?

Q. And distributed?

A. As a matter of fact, there were no feature pictures being produced at all. We hadn't yet gotten to that point.

Q. When did they get to the point of feature pictures?

A. About 1915 they started.

Q. In 1915 and 1916, at that time there were a large number of those companies making and distributing features?

A. No, sir, the industry was very young at that time and there weren't too many people making pictures. As the industry progressed and became established there were more companies came into it, more pictures made.

Q. How about 1917, 1918 and 1919?

[fol. 4389] A. They kept coming up. The number of pictures kept increasing, and the number of theatres kept increasing. The market became—the market grew for more pictures.

Q. And there were a large number of distributors in the market then, were there not?

A. Yes, sir, I would say so.

Q. And those distributors individually, for example, Paramount then releasing over 100 features a year?

A. Paramount at one time released over 100 features a year. I don't recall the exact year.

Q. They have never released that many since, have they?

A. No, they haven't.

Q. Generally at that time the emphasis was simply on quantity of film rather than quality?

A. No, sir.

Q. Well, would you say there were more or less features released in, let us say, 1920, than are being released today?

A. Well, I can't answer that. I don't have the records of that. They are easily available.

Q. What is your best recollection?

A. I would say there might be a lesser number today.

Q. Then prior to 1920 the only important theatre owning distributor was Paramount, is that right?

A. Well, I can't quite place the period. Paramount was [fol. 4390] one of the first companies, first distributing company to also engage in exhibition.

Q. And it was some time around that period, or in the 20's that other distributors and theatre operating companies became associated together in a common enterprise, such as Loew, the Loew theatres and Metro-Goldwyn-Mayer pictures?

A. Yes, sir.

Q. And by 1930 you had about the same general set-up in the industry with respect to theatre ownership by distributors that you have today, is that right?

A. Yes, there was a little different financial set-up with the different companies. Quite a few of them went through bankruptcy and re-organized.

Q. Yes, I understand that, but in 1930, the Fox, Loew's, Paramount, R.K.O. and Warner all had very substantial circuits of theatres, isn't that right?

A. They had theatre holdings.

Q. Well, they were large circuits?

A. Yes, they were.

Q. And they continued to have those down to the present?

A. Yes, sir.

Q. And they were during this period the only distributors who had these theatre circuit affiliates, is that right?

A. No, sir, for a time the Universal Company had some [fol. 4391] theatres. I don't believe they have any today.

Q. That was during what time?

A. I can't quite place the year when that was.

Q. Do you remember what circuits they were affiliated with?

A. They had theatres, not particular circuits, they had—the company bought theatres, either bought them outright or bought an interest in certain theatres scattered throughout the United States.

Q. That period was prior to 1931, wasn't it?

A. I would say so, yes, sir.

Q. Then the other principal distributors at that time besides the ones I have just named were Columbia and United Artists?

A. Yes, sir.

Q. So you had those eight companies were generally referred to as the major film distributors, is that right?

A. Yes, sir.

Q. And produced substantially all of the pictures you call "A" pictures?

A. Yes, those companies produced most of the better quality of pictures.

Q. My question was substantially all, is that correct?

A. Yes, that would be correct.

Q. And I believe you said about 70 per cent of your film revenue comes from the first-run theatres throughout the [fol. 4392] country?

A. Yes.

Q. And most of those first-run theatres in the cities of 100,000 or more are theatres in which either Fox, Loew's, Paramount, R.K.O. or Warner has some financial interest?

A. I don't know I would use the word "most" there. I would say they have many theatres.

[fol. 4393] Q. You know that they have the great majority, do you not?

A. I would have to look over the situation to answer that.

Q. You don't recall it?

A. No, sir.

Q. And then the first-runs in the smaller cities are principally owned by large, so-called, independent theatre circuits, is that right?

A. No, sir.

Q. You would say no?

A. I would say no. There are many individual theatre operators in the United States, very many.

Q. But they produce the smaller part of the revenue, isn't that right, total revenue?

A. There are many independent exhibitors in large cities. There is one here in Buffalo, Mr. Yellen, at the Century Theatre. He is an independent theatre operator. The Music Hall is an independent operation.

Q. In addition to the large theatre circuits affiliated with the distributors, there are large theatre circuits that you refer to in the trade as independent circuits, is that right?

A. Yes, sir.

Q. Those independent circuits are circuits in which a distributor does not directly own the financial stock interest, isn't that right?

[fol. 4394] A. There are circuits in which a distributor does not own directly or indirectly——

Q. A stock interest?

A. Yes, sir.

Q. And among those circuits is the Schine circuit?

A. Yes, sir.

Q. And do you know about how that circuit compares in size with respect to other independent circuits?

A. I believe the Schine circuit is just about the largest independent theatre circuit.

Q. And has been for how long, would you say?

A. I would say for the last five or six years.

Q. And in selling your films to all of the theatres, I believe you refer to a number of accounts that you sold. Did you use that term synonymously with theatres?

A. Included in that number there might be some repeat engagements or return engagements.

Q. But when you spoke of the 15,000 accounts on a good picture you meant the picture would play in approximately 15,000 theatres, rather than that you would bill 15,000 exhibitors, isn't that right?

A. Yes, sir. There would be 15,000 engagements of the pictures.

Q. And with exception of what you refer to as repeat engagements?

[fol. 4395] A. Yes, sir.

Q. In the same theatre, that would be the number of accounts that would be approximately the same as the number of theatres in which the picture played?

A. Yes, sir.

Q. And your selling policy, as I understand you, is generally to sell the maximum number of theatres that you can, is that right?

A. Yes. Our policy is to sell the maximum number of theatres that we can sell, having in mind always the best interest of our companies. There might be some theatres we could sell and wouldn't sell, for many reasons.

Q. Generally speaking, you get the most money out of the picture by having it shown for as much playing time as you can get and as many theatres as you can supply a print to, is that right?

A. That is so. Generally figure a film in the vaults in our various branches doesn't make any money.

Q. On this service of prints, of course, when you first have your print supply made up you distribute a certain share to each exchange based, I suppose, on the number of theatres you expect the exchange to service; isn't that right?

A. Yes. History enters into that. Each branch has a [fol. 4396] quota of prints. For instance, the quota of prints for the Buffalo branch, on an A picture, would be, say, eight and every time an A picture comes along Buffalo knows that they are going to have eight prints and that number is arrived at by history, what happened in the territory. We feel that territory can absorb eight prints of a picture and eight prints will take care of the needs of the territory. If they need more they borrow some from another exchange.

Q. That is what I was going to say. When you have a demand for prints in a particular exchange area in excess of the amount that the exchange happens to have at the time, you may borrow a print from some other exchange, is that right?

A. Yes. It is not too easy to get them because the exchange manager likes to have his own prints there and he doesn't get any credit for any billings that are made in another territory, so it is not too easy to move them around.

Q. As I understand it, the distribution of prints throughout the whole country is under a central control from New York City, isn't that right?

A. Yes, sir.

Q. So that you may, as circumstances require, divert prints from one area to another?

[fol. 4397] A. Yes, sir.

Q. In selling films you have the same personnel sell the circuits that you do the individuals, small theatre-operators?

A. No, sir.

Q. The smaller operators are sold by the salesmen and the branch managers?

A. Sometimes and sometimes the executives sell them too.

Q. I am speaking generally.

A. Generally, yes.

Q. And the circuit deals are negotiated, generally, in New York?

A. No, sir.

Q. Negotiated by the so-called New York sales representatives of the company?

A. Yes, sir.

Q. And in your general scheme of release do you sell the first-run accounts in the various areas first?

A. Yes, sir.

Q. You hold up the selling of the later runs until after you have sold the first-run accounts?

A. It isn't necessary to do that. Sometimes it goes that way.

Q. Sometimes you do and sometimes you don't?

A. Since you sell the later runs for a later run and since [fol. 4397-A] they have a position established by history, by past procedure, you can sell any time that you want to.

Q. That is, there is nothing to prevent you selling them?

A. No, sir.

Q. Before you sell the earlier runs?

A. Of course when you do that you have to be very certain you are going to be able to sell your earlier runs, because if you don't get the early run you find yourself with a second-run customer and no first-run customer, and you will get very little money out of your picture. You lose that substantial money that comes from the first-runs.

Q. When you do that I suppose you go back and attempt to negotiate a first-run instead of a second-run deal?

A. In general that man wouldn't be able to operate on a first-run policy. You wouldn't be able to salvage much that way.

Q. When it comes to servicing the prints that, of course, is dependent upon such clearance provisions as you may have in the contracts that are sold, is that right?

A. Yes, sir.

Q. And then the number of prints into the subsequent runs is controlled by the clearance provisions, if any, in the first-run contracts, isn't that right?

A. Clearance is one of the most important things that we [fol. 4398] sell, and every contract has—every theatre has a position and every theatre has clearance and theatres over a long period of time fit into a pattern of clearance. That was established first by the theatres themselves.

Q. Just see if you can answer the question there.

A. Would you repeat it, please?

(Question read).

A. No, sir.

Q. It isn't? That is, when you have a provision in the first-run contract that says that the second-run can't play the picture until 30 days after the exhibition of the film in

the first-run house you are perfectly free to serve a print to the second-run house within the 30-day period?

A. No, sir.

Q. Where your first-run contract has clearance provisions in it, then it does control the service of prints to later runs, does it not?

A. Yes, the clearance controls the distribution of your picture in a given area.

Q. Yes. And these clearances that you refer to are stated generally in the contracts which you make with the exhibitors, is that right?

A. Clearance is always stated, sir. It is a very important [fol. 4399] part of our contract.

Q. Yes. And it appears in the contract, and the contract will generally fix the playing position of the theatre that is playing the picture, either with reference to some other theatre or certain run in the town; is that right?

A. Yes, sir.

Q. In your contracts you also customarily include a provision with respect to minimum admission prices?

A. Yes. The contract has a spot there where you write in the admission price that the theatre is to charge. Is that what you refer to?

Q. Yes. The contract form, the license agreement.

A. Yes, sir.

Q. Has a space for writing in the matinee, evening and adult and the children admission prices, isn't that right?

A. Yes, sir.

Q. And under the contract the exhibitor undertakes to charge not less than those prices during the time he is exhibiting the pictures named on the contract; isn't that right?

A. Yes, sir. That is considered to be his admission price scale. That is the price he advertises in the newspaper, that is the price the public knows he charges, that is the price posted on his box-office window, so when someone [fol. 4400] goes up to the window they can look at the scale and know what they have to pay to get in.

Q. The price you insert in the contract that he undertakes to charge is generally the price he happens to be charging at that time or contemplates charging during the play-off of the contract; isn't that right?

A. Yes, sir.

Q. And that price is generally a uniform one, is that correct?

A. No, sir. I don't quite know what you mean by "uniform one."

Q. Perhaps I didn't make myself clear. These films, that is, up until the year 1941, you customarily included in the single agreement all of the feature films that you licensed, or that you expected to have available during one year of motion picture season; isn't that right?

A. We tried to sell all the pictures we had available for a season, yes.

Q. Those pictures that you would have available would vary so widely in cost——

A. Yes, sir.

Q. —and also vary widely in box-office, the ability to draw patrons to the box office?

A. Not at the time we were selling them.

[fol. 4401] Q. Even at the time you were selling them you assumed that certain variations would occur, did you not?

A. Yes, sir. We sold pictures at different terms.

Q. You would have different price brackets, is that right?

A. Yes, sir.

Q. And the ones you thought were going to be the better ones you would generally stipulate a guarantee against the percentage on?

A. No, sir.

Q. You didn't try to do that?

A. We would try to get the better terms for better pictures and there was a question of what the company policy was as to terms.

Q. Your best terms, I suppose, are always a guarantee against a high percentage. That is, the best and most favorable deal you can make?

A. History comes in there again. If we have a customer who is a solid customer, a man who pays his bills and gives us an honest count, and we have been dealing with him over a long period of time, we don't get a guarantee from him. We are willing to sell percentage.

Q. Will you please answer the question?

A. I am trying to answer.

Mr. Wright: Will you read it?

(Question read).

[fol. 4402] The Witness: I really believe your question requires an explanation.

Q. You can't answer that yes or no?

A. No, sir.

Q. In any event, in making deals with the exhibitor, you attempt to put the terms in the contract which will get you—which will assure you of the most revenue from the exhibition of the film in the theatre, isn't that right?

A. Yes, sir.

Q. And there is always, of course, a substantial difference in what you try to get and what you get?

A. No, sir.

Q. It never happens?

A. It does happen, yes, but your question was "always".

Q. Sometimes you get what you try to get; is that right?

A. Many times you get it.

Q. And many times you get less than you think you are entitled to get, is that right?

A. Yes, sir.

Q. And the extent that you approach what you think you ought to get, I suppose, is in part dependent upon the relative bargaining power of the exhibitor that you are dealing with, is that right?

A. That, in addition to the selling ability of the man [fol. 4403] who is attempting to get the deal.

Q. That is the result of the combination?

A. Buyer and seller.

Q. The selling ability of the distributor and the selling ability of the exhibitor?

A. Yes, sir.

Q. Your results in the particular situation may vary widely from the so-called 35 per cent ideal?

A. We try to get 35 per cent terms from all runs. We do our very best to get them. Sometimes we don't get it.

Q. Of course, specifically, you remember the deals made with the Schine Circuit there while you were sales manager?

A. I have always considered the Schine Circuit terms to be very satisfactory terms.

Q. That was not my question. Will you confine yourself to the answers to the questions?

A. I am sorry.

Q. Counsel here can make the necessary argument. The answer is "Yes" to my question?

A. Would you repeat the question?

(Question read).

A. Which company do you refer to?

Q. Warner?

A. Well, as I recall there, the deals I made with the [fol. 4404] Schine Circuit while I was with Warners, they were comparable with the deals we made with anybody else.

Q. Do you recall selling features to the Schine Circuit on the basis of a 20 per cent rental or a flat rental at the exhibitor's option?

A. I don't recall that, sir, but if you will mention the theatre or town I believe the contract will show what it was.

Q. You don't remember of making a deal of that kind?

A. No, sir.

Q. And you remember selling the Schine opposition on terms like that?

A. No, sir. In selling a group of pictures to the Schine Circuit there might be pictures there, some are sold at 35 per cent terms, some are sold for lesser terms, some on the same contract are sold flat. It depended on the quality of the picture, in general, and your ability to get the price.

Q. You would always try, of course, to get the most that you could?

A. Yes, sir.

Q. For any of the pictures?

A. Try very hard.

Q. And if you thought you could get 40 per cent you would try to get 40 per cent, is that right?

[fol. 4405] A. Yes, sir, if we felt 40 per cent was fair.

Q. The question of whether it was fair or not was really primarily a question of whether you thought it was fair to your company, isn't that a fact?

A. No, sir.

Q. You attempted to get only what you thought was fair to the exhibitor?

A. Fair to both. After all, you sell a man today, you have to go back and sell him again tomorrow, and if you over-charge him you probably won't be able to sell him again.

Q. But you are in a more comfortable position when you

can take care of an over-charging by the way of adjustments, isn't that right?

A. We consider that a good business position to be in.

Q. You find that if you sell a picture on 35 per cent and you later feel it is worth 40 you have considerable difficulty in going back to the exhibitor and telling him you want 40 and getting it?

A. That is very difficult to do.

Q. So your aim is always to get in the contract in the first instance the maximum rental which you think you can get out of the theatre; isn't that a fair statement?

A. No, sir. I would still like to include the man that I am selling to in that thought. I don't like—you might be [fol. 4406] able to get your 40 per cent and he might agree to pay it, but you might be getting too much from him.

[fol. 4407] Q. And you might make such a contract, is that right?

A. Well, it is possible.

Q. It has been done?

A. I assume it has.

Q. Now, with respect to these admission prices, as I understand you, customarily in selling all the theatres that you sell, you write in these admission price provisions in the contracts at the time they are made, is that right?

A. Yes, sir.

Q. Then you expect the exhibitors to maintain those prices on the pictures that are covered by the contract, is that right?

A. Yes, sir.

Q. And in general those admission prices are to some extent determined, are they not, by the time in a particular competitive area that the exhibitor gets the picture?

A. No, sir, I wouldn't say that.

Q. You don't think that is generally true?

A. No, sir, there are many, many theatres, many suburban and subsequent-run theatres that charge just as much as the first-run theatre. There is one theatre I have in mind in New York City, a subsequent-run theatre, the Plaza Theatre that charges more than first-run theatres.

[fol. 4408] Q. What you are giving me are the exceptions to the general rule?

A. They are more than the exceptions, they are a great many theatres.

Q. They are more than the exceptions?

A. Yes, sir.

Q. That is, ordinarily you stipulate an exhibitor's admission price that he is going—in his contract that he charges an admission price of 25 cents, you would not expect him to play the pictures at that price if they had played a substantially number of theatres in the same competitive area at, we will say, 15 or 20 cents, is that correct?

A. I would say, no, I can't answer such a general question, because there are so many factors you have to have in mind in determining that. I can't answer the question.

Q. I understand there are many factors; one factor in determining when one exhibitor should be permitted to play films with respect to the time that another competing exhibitor should be permitted to play them, is the admission price charged by the theatre?

A. Admission price is one factor in determining that, yes, sir.

Q. As I understood you to say, when the theory on which [fol. 4409] protection clearance, as you call it, was introduced in the business, it was to protect the investment of somebody in a theatre by stipulating that if he plays the first-run at such an admission price, why, then, it won't be played for a certain number of days in theatres which might charge a lower admission price, is that correct?

A. Your contract with that first-run theatre would stipulate its clearance. It would have nothing in there in regard to the admission price to be charged by any other theatre.

Q. All it would have would be a statement of the clearance, but that clearance would be fixed at least to some extent with reference to the admission prices at which the pictures bought might be subsequently exhibited in the same competitive area, is that right?

A. Admission price always is one of the factors in determining the clearance.

Q. And in general the shape that your clearance and admission price structure takes in any particular competitive area is that the first-run theatres charge the highest price and then the second-run the next, and so on down the line through regular runs?

A. With many, many exceptions.

Q. And those exceptions, of course, depend, I suppose, on [fol. 4410] individual circumstances in the evaluation of individual cases?

A. It depends also on the possibility of the theatre to get that kind of an admission price. They may be in an area where they know they can get it and try to get as much as they can.

Q. I assume in all cases, as far as the exhibitor is concerned, he wants to get the most admission price he can get, considering what he has got to play?

A. Yes, sir.

Q. And the character of what he has got to play is, of course, determined in part by the extent that what he is offering the customers has been already offered them in other theatres in the area that he draws from?

A. Yes, sir.

Q. As far as the later run operator is concerned, he ordinarily has no way of controlling the amount of playing time that occurs in the theatres that play ahead of him over particular pictures, is that right?

A. Yes, sir.

Q. So that the only protection that is got for whatever investment he may have in his theatres is simply the good faith of the distributor in seeing that the value of the picture isn't completely destroyed or eliminated before it gets to him?

[fol. 4411] A. Well, generally a man like that, Mr. Wright, knows before he leases a theatre——

Q. Just see if you can answer the question.

A. Will you read the question, please?

(Question read.)

A. I would say "No" to that question.

Q. Well, what protection does his contract give him with respect to the matter that I just stated?

Mr. McClennen: Just a moment. That I object to. The contract should be laid before the witness if such a question is to be put.

The Court: Overruled.

The Witness: I could not answer that question——

The Court: It is a comparison.

The Witness: (Continuing)—without naming a specific theatre and specific situation.

Q. Let us assume a theatre that is playing in Syracuse at a 25-cent admission; now, all you do is sell him the contract which provides that he charges 25 cents and he plays the picture; he can play the picture on a certain date; he

has no assurance at all as to the extent to which the value of the picture may have been completely absorbed by prior runs, isn't that right?

A. No, sir.

Q. Well, what protection does he get?

[fol. 4412] A. He knows ahead of time how previous pictures have played to begin with so he knows the situation, and there is clearance straight on down the line. The first man takes clearance over the second man; the second man takes clearance over the third man; the third man takes clearance over the fourth man, and so forth. It runs all the way down from the first man to the last man. With every theatre there is clearance until it gets down to the last man. Maybe there is no theatre left, so it will have to stop some place.

Q. Then you say whatever assurance he has depends on the history of the particular theatre that is involved?

A. And the knowledge that he, himself, has.

Q. As to where the theatre has played in the past, is that right?

A. Yes, sir.

Q. And in determining how much—strike that out. Generally speaking your rentals also decrease with the lateness of the runs on which the picture plays in accordance with the decrease in admission price and lateness of play time, isn't that right?

A. Generally so, yes, sir.

Q. And in fixing a rental for any particular theatre, one of the factors you always take into account is the terms on which the picture has played other theatres in the area, is [fol. 4413] that right?

A. Would you repeat the question?

(Question read.)

A. No, sir.

Q. That is not a factor?

A. No, sir.

Q. You don't give any consideration, in fixing the terms for one theatre, as to what the terms are for a competing theatre on the same picture, is that right?

A. That is right.

Q. And that applies to clearance terms and admission prices?

A. Yes, sir.

Q. So that in determining, when you testified that as to what you thought was the fair rental here, in so far as you were concerned, that was the rental on which you excluded entirely from consideration the terms with respect to admission price, clearance run and film rentals on which the pictures were sold to other theatres in the area?

A. Yes, sir.

Q. Now, in terms of fairness to an exhibitor—strike that out.

The Court: We will suspend at this time.

(Whereupon a recess was taken until 2 o'clock P. M.)

[fol. 4414] After Recess, 2 P. M.

Appearances: Same as before noted.

(By consent of Counsel, Plaintiff's Exhibit 550 for identification is replaced with a plainer photostat and is marked with the same exhibit number.)

ANDREW WILLIAM SMITH, JR., resumed the stand in behalf of the Defendants, having been previously sworn, was examined and testified further as follows:

Cross-examination (Continued).

By Mr. Wright:

Q. When we adjourned, Mr. Smith, I think we were discussing the question of film rental. As I understand it, you say the determination of the rental is based upon what you expect the theatre to gross for the pictures in question; is that right?

A. Yes, sir.

Q. And that expectation of gross is based upon what the admission price will be and how many people will come into the theatre to see the picture on that admission; is that right?

A. Yes, sir.

Q. In that connection it is a fact, is it not, that the number [fol. 4415] who may be expected to come in and see the picture at a particular price will be, in part, determined by the number from the area who have already seen the picture, isn't that right, somewhere else?

A. Yes, sir, some of them may want to see it again.

Q. On this question of what you call a "move-over," as I understood you, that is where you move a picture that has been played first-run for a certain length of time in one theatre over to another theatre without any time elapsing between and it continues to play at the same admission price; is that correct?

A. That is true.

Q. And while you stated, I believe, that it was customary to have those move-overs only in situations where the first-run theatre and second-run theatre were in some way connected through ownership or operating policy, if you chose to do so there would be nothing to prevent you from arranging for or licensing a move-over run at a theatre which was not owned or operated by the first-run theatre owner, isn't that right?

A. Your designation of first and second-run is not quite correct, sir. They are both first-run theatres.

Q. I didn't say second-run. If I did I misspoke myself. I said second theatre.

The Court: You said second-run.

[fol. 4416] Mr. Wright: I meant the second theatre.

A. I don't know of any law against it, sir, but I don't know of a move-over ever having taken place from one theatre to another theatre unless the move-over theatre was owned or controlled by the first theatre.

Q. The policy you pursued in that respect was simply because that was the way you wanted to operate, is that right?

A. No, sir.

Q. You say there is no law against it, other than such inhibitions as the Sherman Act might place upon it, is that right?

Mr. McClennen: That is objected to, if your Honor please. Of course, there is no law against calling something that is not a move-over——

The Court: I think the question should be put in another form, Mr. Wright. State what the inhibitions were.

Mr. Wright: All right.

Q. What, if any, inhibitions are there which you say prevent you from licensing features in that manner?

Mr. McClennen: He didn't say.

The Court: Well, he is asking now if there were inhibitions. What, if any, were the inhibitions, that is the question as I took it to be. You mean to prevent the move-over [fol. 4417] to some theatre which had no connection with the original theatre, isn't that your question, Mr. Wright?

Mr. Wright: Yes.

The Witness: It would be a question of business judgment, Mr. Wright, and I would say, off-hand, it would be bad business judgment to move a picture over from a first-run theatre to another theatre owned by someone else.

By Mr. Wright:

Q. Whether or not it would be good or bad business judgment would depend, I suppose, on just whose interests you felt it advisable to serve at the time; isn't that right?

A. We generally consider our own interests important.

The Court: Do your license agreements make a provision for a *over*-over or do they not?

The Witness: When you make a move-over you write up a license agreement for that move-over, just like you write the agreement for the first-run.

The Court: How about your clearance then?

The Witness: If the clearance in the particular situation is——

The Court: The third day, say, or the end of the first [fol. 4418] period, you mean, or the second?

The Witness: No, sir. I will have to state that another way. The move-over run is still a part of the first-run. The first-run has not terminated until the end of the move-over run.

The Court: It would run until the end of the move-over?

The Witness: Yes.

[fol. 4419] Q. So in writing your license provision for the "Move-over" run, you simply provide that the "Move-over" commence immediately at the conclusion of the run in the first theatre, would you not?

A. No, sir, you would probably write the contract stating the date that the "Move-over" run was to start, and that would be the——

Q. As I say, in the case of a move-over that would be immediately following the completion of the exhibition in the first theatre?

A. Yes, sir.

Q. Whereas in the second-run contract there would be an interval of time elapse and probably a lower admission price, isn't that right?

A. Yes, sir.

The Court: Supposing in the interim there was an expiration of the clearance, in that case, you extend the time and make your terms extending the time of clearance which is extended?

The Witness: Well, your Honor, it is hard to answer that general question in that regard. We would have to have a special situation in mind and see what the clearance situation is there. It might be possible for the same clear-
[fol. 4420] ance to exist as would exist if the picture only played the first-run theatre and did not then move over for the continuation of the first-run in the move-over theatre. In other words, if it was a 30-days' clearance on the Great Lakes, and the other picture moved over to the Hippodrome, the other theatre might come in and play 23 days after the Hippodrome.

By Mr. Wright:

Q. In each case it would depend on the kind of clearance provision you chose to provide, is that right?

A. The kind of clearance agreed upon, yes.

Q. In setting up all of the runs or clearances in a particular area, I suppose as far as the film company's objective is concerned, you attempt to get the maximum total rental you can out of the picture in the area?

A. Yes, sir.

Q. I believe you said before on your direct-examination that some of the factors you took into account, in deciding where you would play your pictures was, I think, the size of the theatre and character of the operator; those were, I think, the two you mentioned, and you said there were others?

[fol. 4421] A. Are you referring, sir, to the selection of the second-run account?

Q. The selection of any account?

A. Yes, sir.

Q. As to the size of the theatre, that, of course, doesn't necessarily control in itself what revenue you are going to get out of your pictures, isn't that correct?

A. If the theatre had a very small number of seats it could control, sir.

Q. I suppose that would depend entirely on the amount of playing time your pictures actually got in the theatres also?

A. The playing time would be a determining factor.

Q. That is, if you got five days of playing time on a particular picture in a 300-seat theatre, you might get more revenue from the picture out of that theatre than you would from playing the same picture for two days in a 500-seat house, is that right?

A. That is possible.

Q. So that one of the factors you always have to consider is the amount of playing time that you can expect to get for your features in a particular theatre?

A. Yes, sir.

Q. And I suppose the amount of time that you can get is to some extent determined by the extent to which the [fol. 4422] theatre is committed to play pictures of other distributors?

A. Yes, the amount of time would be dependent to an extent on the theatre's operating policy at that time.

Q. The policy, of course, is made up of the number of changes a week?

A. Yes, sir.

Q. And the other features that play?

A. Yes, sir.

Q. And the admission prices?

A. Yes, sir.

Q. And as to admission prices generally you attempt to maintain them at the highest levels you can, is that right?

A. We like to have them put as high as they possibly can be consistent with good business judgment.

Q. Well, that is, you mean high enough to give you the most revenue you can get out of a particular run?

A. Yes, sir.

Q. And now I think you said in your direct-examination that in determining film rentals, you, of course, took into account the theatre's policy and where it was a double-feature policy in effect, why, you would make allowances for what had to be paid for another feature perhaps sold by some other distributor in determining what you ought to [fol. 4423] get for yourself, is that right?

A. Yes, sir, the customer would tell us what he paid for the other feature and, in general, we would allow that as a deduction from the gross before computing our contract.

Q. You mean, if it were provided in the contract that the deduction could be made, isn't that right?

A. Yes, sir.

Q. Now, your policy with respect to what you provide in the contract is something a little different from merely making adjustments based upon the use of a certain feature, isn't it?

A. I don't understand the question, sir.

Q. Well, to be specific, you, in your printed license provision that you normally use in making your contract do not have any provision there which states that if a second feature is played that the cost of that feature may be deducted from the rental paid for one of your pictures, isn't that right?

A. That is right.

Q. Whenever that is done that is a special provision?

A. That is quite correct, sir.

Q. And the same thing is true, is it not, with respect to a bank night, or similar attractions, the regular form on which these companies, and you have seen them, license [fol. 4424] films, doesn't make a provision for deducting from the cost of the film such amounts as the exhibitor might expend for his bank night or Bingo or similar extra attractions, is that right?

A. Is your question that the printed clauses do not cover such deductions?

Q. Your regular form of contract, that is right?

A. That is correct.

Q. And if you do make any such arrangement that is the result of a special agreement covering the points, is that correct?

A. Yes, sir.

Q. Now, I notice in a contract that is in evidence here, as —or a letter agreement in evidence as F-193, a letter dated June 8th, 1939, signed by 20th Century-Fox Film Company Corporation, by William Sussman, and Schine Enterprises Corporation, dated June 8th, 1939, which covers the seasons 1939-40, 1940-41 and 1941-42, the following provision appears:

"If any picture played on percentage is played in conjunction with bank night or similar attractions, you shall have the right to deduct the actual cost of the operation

of such attraction from the gross receipts before accounting to us for our percentage."

When you do make special agreements for the deduction [fol. 4425] of the expenses of bank night or similar attraction, is that the form that you ordinarily use?

A. Do you mean is that the phraseology, the wording, is that your question?

Q. Well, that provision, yes.

A. Yes, that is the general form.

Q. And when you make a concession for a bank night or a similar attraction, that would include, I suppose, Bingo or games of that kind, the provision is one permitting the exhibitor to deduct his cost of the attraction, is that right?

A. Yes, that is quite right, and that would be handled and written right in the contract agreement.

[fol. 4426] Mr. Wright: While the witness is on the stand I want to offer in evidence a memorandum that has previously been identified as having come from the Warner files. It is marked for identification as Plaintiff's Exhibit 550 and it is an inter-office communication, dated September 1, 1934, from H. A. Seed, Branch Manager, to Mr. A. W. Smith, Jr., at the Home Office, and I am now offering that in evidence.

Mr. McClennen: This Plaintiff's Exhibit 550 for identification we object to on the ground that has heretofore been discussed with your Honor, as an inter-office communication, not admissible in evidence, and if received to be limited so that it shall not be evidence of the facts stated in it, that considerable portion of it has relation to Shorts and not to feature contracts, and that this introduction is not cross-examination of the witness on any subject on which he was examined in chief.

The Court: Let me see it.

(Counsel hands Plaintiff's Exhibit 550 for identification [fol. 4427] to the Court.)

The Court: Objection overruled. I will receive it.

(Thereupon the two-page photostat copy of inter-office communication, dated September 1, 1934, previously marked as Plaintiff's Exhibit 550 for identification was received in evidence.)

By Mr. Wright:

Q. Mr. Smith, I believe you testified on your direct examination you identified some Warner branch office records?

A. Yes, sir.

Q. In the branch offices, not only of Warner but these other companies you worked for, as well, there are maintained, are there not, so-called cut-off or play-off records which show where all of the theatres in which your features pictures played and the periods during which they played, and the contracts under which they played?

A. You are covering quite a few records there, sir. We do maintain complete records of where our pictures play and the dates and the gross receipts.

Q. And the contracts under which they play?

A. Yes, sir.

Q. And those records you keep for the benefit, among others, of those in the sales department who are engaged in [fol. 4428] soliciting accounts or licensing your films, isn't that correct?

A. Yes, sir.

Mr. Wright: That is all.

The Court: Anything, Mr. McClennen?

Mr. McClennen: No.

The Court: All right. Next witness.

Richard Struewe, a witness called by and on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct examination:

By Mr. McClennen:

Q. Your residence?

A. Albany, New York.

Q. You are in the employ of what company at the present time?

A. Republic Pictures Corporation.

Q. In January and February, 1937, were you in the employ of Warners?

A. Yes.

Q. I show you identification Defendants' Exhibit 137. Is this in your handwriting?

A. Yes.

Q. And is that the report which, on or about that date, you handed in of your daily activities to your office?

[fol. 4429] A. That is correct.

Mr. McClennen: I offer it.

Mr. Wright: No objection.

Mr. McClennen: The portion offered is under the heading "Theatre-Plaza. Location: Malone," and does not include the report for the other theatres contained on this report in other places.

The portion offered reads: "Theatre: Plaza. Location: Malone. Exhibitor: M. Boumansour. This situation intends to go to second-run policy starting 5-1. Offered him a 60-picture deal. Only wants 30. Offered him 30 pictures, 1935-36 product second-run. He would not consider any proposition except a 30-picture deal on this year's pictures."

That is under date of February 4, 1937.

(Thereupon the report referred to, dated February 4, 1937, previously marked as Defendants' Exhibit D-137 for identification was received in evidence.)

Mr. Wright: If the Court please, I apparently misunderstood Counsel. I thought we were to have Mr. Ed. Smith [fol. 4430] and Mr. Louis following Mr. Andy Smith and if we could have a recess for five minutes I believe I could get hold of the documents I intend to examine Mr. Struewe on.

(Short recess.)

Cross-examination.

By Mr. Wright:

Q. Mr. Struewe, this memorandum or report that is marked as Defendants' Exhibit D-137, you say that records the results of a conversation you had with Mr. Boumansour at Malone on February 4, 1937?

A. That is right.

Q. You were at that time traveling the Albany territory for Warner Bros.?

A. Yes, sir.

Q. Soliciting accounts?

A. Yes, sir.

Q. This satement that you have here offered in the 60-picture deal, that relates to some statement you made to him?

A. Yes.

Q. And what was it you told him?

A. Well, in that particular year we were selling 60 pictures. That report is dated in 1937. That means I offered [fol. 4431] him the 1936-37 product at that time.

Q. What you told him was he could have the 1936-37 product second-run if he bought all of the pictures?

A. That is correct.

Q. And if he only bought—if he only wanted to play 30 pictures he could only have 1935-36 product?

A. That's all I would offer him on a 30-picture deal.

Q. Before you called on him had you had any discussion with the branch manager as to what you should or should not offer to Mr. Boumansour?

A. I don't recall that.

Q. You don't know whether you did or not?

A. No.

Q. Did you know the policy that the Plaza was being operated on at that time?

A. I didn't get that question.

Q. Did you know the policy that the Plaza was being operated on at that time?

A. I am not sure of it, no.

Q. You don't know whether you did or not?

A. I said I wasn't sure. He had first-run policy and a second-run policy.

Q. At that time?

A. I don't know when he changed from first to second.

Q. Your report says that he intends to go to a second-run [fol. 4432] policy starting May 1. Is that what he told you?

A. That is correct.

Q. That is what he told you he would like to do?

A. That is correct.

Q. You say you don't know whether you had any discussion with the manager of the exchange before you went up there and made this offer or not?

A. I am not sure.

Q. Who was the manager then?

A. Mr. Norman Ayers.

Q. Do you recall whether you had had any discussion with any other Warner sales representative before you went up and made this offer?

A. No, I don't recall.

Q. Normally, when you were calling on accounts in that area at that time, and the exhibitor wanted to buy some pictures, you would write up an application for what he wanted to buy, if it was open, and then send it in to the branch, wouldn't you?

A. Correct.

[fol. 4433] Q. But in this instance you didn't have any discussion of terms with him at all?

A. You mean Mr. Boumansour?

Q. Yes.

A. Not that I recall, I didn't.

Q. And all you told him was that if he wanted 1936-37 product, beginning in the spring of 1937, that he would have to buy 60 pictures, is that right?

A. A complete deal, yes, whatever the season called for.

Q. If he only wanted to buy 30 pictures then he could not have 1936-37 product, he could only have 1935-36, is that right?

A. That is correct.

Q. Now, your job, generally speaking, was to get additional revenue from the towns that were in your territory wherever you could, wasn't it?

A. That is correct.

Q. And even 30 pictures of the 1936-37 season second-run in that town would have given you more revenue for 1936-37 pictures out of that town than you were then getting, isn't that right?

A. That is correct.

Q. You had no second-run there?

A. No.

Q. But you refused to even discuss terms for a 30 picture [fol. 4434] deal on the 1936-37 product, is that right?

A. That is right.

Mr. Wright: That is all.

Mr. McClennen: That is all.

JACOB ARMM, a witness called by and on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. McClennen:

Q. Your residence?

A. Albany.

Q. In August of the year 1940, what was your occupation?

A. Salesman for Columbia Pictures.

Q. You know Mr. Lawrence J. Carkey?

A. Yes, sir.

Q. I call your attention to Mr. Carkey's testimony, the year 1940, as stated at page 3554, the period of the conversation as between August 15th, 1940 and August 30th, 1940, stated at page 3560 and the conversation stated at 3562, where he says "I called in Jack Arms of Columbia and told him I was ready to talk second-run product for the [fol. 4435] City of Ogdensburg as per our conversation of a few weeks before"; did Mr. Carkey tell you that?

A. Why, he didn't call me in. I used to come in to see him every other week. I came in there every Tuesday, every other Tuesday, rather.

Q. When you went in there at that time, I continue "he," that is meaning you, "advised me second-run had been sold to Schine"; did you so advise him?

A. No, sir.

Q. Did you have some talk about his buying some second-run Columbia pictures for Ogdensburg?

A. I did.

Q. What did you say to him and he to you on that subject?

A. Well, he told me at that time that he contemplated opening a theatre in the market place in Ogdensburg and that he was waiting for—I am trying to think of the man's name, he was an interior decorator who was supposed to furnish him with money, and another man in Ogdensburg, and a certain builder, I forget his name, he was there at the time, and he showed me plans for the place. It was not Colombo, I am trying to think of the man's name. He asked me was there a second-run in Ogdensburg, and I said "No, there wasn't." Could he buy it, and I said "Yes, the

[fol. 4436] Pontiac was closed at the time and Schine didn't have a second-run, there was no reason why he could not have it." He asked me what the terms would be. I told him the thing to do at that time was to open up. "I have no idea of terms for a place not opened up, and after you play them we will check the pictures and determine what they are worth, that is the only way I could even talk price on a deal, where there was no theatre operating."

Q. Have you stated the whole of the conversation at that time?

A. Yes, sir.

Mr. Wright: What time was this?

The Witness: I did not hear you.

Q. Have you any recollection of the time of this first conversation?

A. Oh, it was in the summertime. I don't know exactly when.

Q. And did you subsequently have another talk with him about Ogdensburg?

A. Oh, yes, several talks, quite a few, and at that time I had an appointment with him, and it was a few weeks later, and he left word with his son that he would meet me in Norwood, where he was taking over two other theatres, the Norwood and Norfolk from another party, his name was Curry, that I would meet him in Utica and go to Norwood from there. I was on my way to Potsdam, [fol. 4437] and I would meet him on the four o'clock train that day. I could not tell you what day it was, it was in July or August. I met him there and sold him two contracts at that time, one for Norwood and one for Norfolk. I said "Larry, let's go up and see this market place." I could not get it in my head where it was. I had gone through the town several times. He said "I guess we will have to forget about it temporarily because—I think Mr. Shapiro, I think was the man's name who was to finance it—had backed out." I never went up to Ogdensburg.

Q. Was that all the conversation as far as Ogdensburg was concerned?

A. I don't think there was ever anything mentioned further about it because there was nothing done about it.

Cross-examination.

By Mr. Wright:

Q. When and where was this second conversation you just testified to?

A. This last one?

Q. Yes.

A. In Norwood.

Q. When was that?

A. It was in the summertime, I can't tell you just when it [fol. 4438] was, quite a few years ago.

Q. In the summer of 1940?

A. Probably 1940.

Q. This is the town called——

A. Norwood.

Q. Norwood?

A. Norwood, yes, Norwood and Norfolk, there was two towns.

Q. Where are those two towns?

A. Do you know where Potsdam is?

Q. Where are they from Ogdensburg?

A. Just a few miles from Ogdensburg. I will try and figure that out.

Q. Whereabouts in this town did you see him?

A. Norwood.

Q. Whereabouts in the town?

A. In the theatre.

Q. What theatre?

A. Norwood Theatre.

Q. Who else was present?

A. Who else was present? There was some mechanics there, four or five mechanics there tearing the walls out.

Q. I mean during the,—or in your presence and Carkey's presence, when you had this conversation, who were the parties to the conversation, anybody but you and Carkey?

A. Just Larry and I.

[fol. 4439] Q. Just you two?

A. Yes, sir.

Q. What was it that was said then?

A. I had sold him the deals, as I told you, for these two theatres there, Norwood and Norfolk.

Q. Yes.

A. And I asked Larry to let's go up and take a look at that market place where he was going to build a theatre.

Q. At Ogdensburg?

A. At Ogdensburg, yes, sir, it isn't very far from there, maybe 35 miles, I am not sure of the exact distance.

Q. Then what was it he told you?

A. I am not sure about this man's name. He told me this decorator who was doing his work was his partner who was going to give him the money to fix it up with, and he had backed out.

Q. Did he tell you anything else?

A. I can't remember that far back exactly what conversation there was. There was nothing much more that would interest me.

Q. At that time that is all you remember?

A. I really can't remember; if there was anything important I might have remembered it; there might have been some minor things, I can't remember that far back.

Q. You don't remember whether you had any further con- [fol. 4440] versation with him later about Ogdensburg at all, is that right?

A. We talked about it casually now and then. I asked him a few times, I can't tell you when I asked him, we would go out and eat and talk about those things, nothing doing, could not get the finances.

Q. Where did you talk to him next time?

A. Well, I can't say, in his office, or probably across the street in the restaurant, I can't tell you exactly where. I used to see him quite often.

Q. Could you tell us exactly when?

A. No, I could not tell you exactly when. It might have been the second Tuesday after, because I usually stopped there on a Tuesday.

Q. When was it you had the last conversation with him about Ogdensburg?

A. Oh, I could not tell you that.

Q. You don't have any idea?

A. No. I wouldn't have any reason to try to remember it, I couldn't tell you.

Mr. Wright: That is all.

Mr. McClennen: That is all.

[fol. 4441] ELMER LUX a witness called by and on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct examination.

By MR. McClennen:

Q. Your residence?

A. Buffalo, New York.

Q. You know Mr. Hubert P. Wallace?

A. I do, sir.

Q. Mr. Wallace, speaking of 1937, at page 2784, said "Mr. Lux pointed out to me that he did not think it would be a practical thing for me to run second-run and first-run at the same time, that is, at the same theatre at the same time, and he discouraged me. He said "I think it is not a good plan"."

Did you have such a conversation as that with Mr. Wallace?

Mr. Wright: Excuse me, I don't believe the date of this has been fixed.

Mr. McClennen: 1937.

The Court: I suppose it does appear in Mr. Wallace's testimony, but whom did you work for, were you in the office, where?

[fol. 4442] The Witness: I was with the Company in 1937.

The Court: Which Company?

The Witness: R. K. O. Radio Pictures.

Mr. Wright: This is with respect to what theatre are we on now?

Mr. McClennen: This is with respect to Mr. Wallace's testimony at page 2784, and he is speaking about the subject matter of second-run in the Capitol Theatre at Auburn.

[fol. 4443] Q. Did you have such conversation as I have just read to you?

A. In nineteen—I did not.

Q. What was your position in the motion picture business in 1937?

A. In March, 1937, I came to work for RKO Pictures, salesman in the Buffalo city proper and immediate vicinity.

Q. And how long did you continue in that particular position?

A. Until June or July, 1941, when I was promoted to branch managership.

Q. During the time that you were a salesman was Auburn within your area?

A. No, it was not.

Q. In 1941 you became what?

A. Branch manager.

Q. For RKO?

A. RKO-Radio Pictures.

Q. What time in 1941?

A. It was either late June or early July. I wouldn't be definitely certain of the date.

Q. As branch manager where was your office?

A. Here in Buffalo.

Q. Prior to your becoming branch manager here in Buffalo where was your office?

A. I also worked in the Buffalo office.

[fol. 4444] Q. You worked in the same office?

A. Out of the same office, yes.

Q. Can you inform me where you were on the 11th of September, 1941?

A. I would probably have to refresh my memory by looking at my records of that week.

Mr. McClennen: Will you mark this for identification?

(Thereupon weekly expense account report referred to was marked as Defendants' Exhibit D-166 for identification.)

Q. I show you Defendants' Exhibit D-166 for identification. What is that paper?

A. That is my weekly expense account report, sir.

Q. From that can you state where you were on September 11, 1941?

A. On that date I was in Syracuse, New York.

Q. And on the 12th of September where were you?

A. On the 12th of September I was en route from Buffalo, stopping in Batavia, and then on into Buffalo, all the same day.

Mr. McClennen: Will you mark this for identification?

(Thereupon weekly expense account report referred to was marked as Defendants' Exhibit D-167 for identification.)

[fol. 4445] Q. I show you Defendants' Exhibit D-167 for identification. Is that your expense account for the following week?

A. For the week ending September 20, 1941, it is, sir.

Q. Where were you on Monday, September 15th?

A. Well, on that day I left Buffalo in the morning, went to Albany.

Q. And where were you on the 16th?

A. In Albany all day, leaving probably late in the afternoon, returning to Buffalo.

Q. Where were you on September 17, 1941?

A. On September 17, 1941, I went from Buffalo to Rochester and stayed over night in Rochester.

Q. Where were you on September 18, 1941?

A. On the 18th I worked in Rochester and then returned to Buffalo that same day.

Q. Did you have a telephone conversation with Mr. Ed. Smith and with Mr. Wallace in September, 1941?

A. I did.

Q. And where were you at the time you had the talk?

A. I was in Warner Bros. theatre office in Albany and I believe they called me from Syracuse.

Q. Was that the only day that you were in Albany in the two weeks from September 7, 1941, to September 20, 1941?

A. I believe I was there over night that night and part of the next day, returning the next day, if I remember that [fol. 4446] correctly.

Q. Referring back to Defendants' Exhibit D-167 for identification, can you tell me whether on September 16, 1941, you flew back from Albany to Buffalo?

A. I did return by air, indicated by the fact that I took a bus to the Airport.

Q. Was this call by telephone when you were at the Warner Bros. theatre office in Albany on your call or on somebody calling you?

A. They called me, sir.

Q. And who called you and spoke first?

A. Specifically, I couldn't say. I do know that both Wallace and Smith talked to me on the occasion of that date, but who talked first I wouldn't know—I wouldn't recall.

Q. Do you remember anything about what Mr. Wallace said to you in that conversation?

A. Well, generally it concerned a discussion of some pictures that we did have open or, rather, available, and that

he had been interested in buying for the Strand Theatre in Syracuse.

Q. Can you remember any more of the detail of it, what the pictures were?

A. Two of them I do recall were his opening pictures. If I remember correctly, one of them was the animal picture, [fol. 4447] Frank Buck picture, "Jungle Cavalcade", and I believe the other one was the musical picture, "Flying Down to Rio." While there were probably five or six pictures discussed, those two I do recall were for opening consideration, and he also was interested in two other pictures we had, which were, of course, under contract to our own theatre department there in Syracuse but which I told him if they did not find room for them in the usual manner, or if they rejected them, which was probably their privilege, I would be interested in giving him the opportunity to have them.

Q. Do you remember the names?

A. One of them was, "Hurry, Charlie, Hurry", I believe, and the other was "They Meet Again".

Q. In the course of that conversation by telephone do you recall telling him anything more about those two pictures than you just stated?

A. Specifically, no. The conversation beyond that was probably of a general nature. I did more or less assure him that he would have the first two pictures I mentioned without any difficulty, although I did not have immediate home office approval, which usually is necessary, in fact, is necessary, but I felt confident I could go along on those two so that he might proceed with proper advertising, and so forth.

[fol. 4448] Q. Did you say anything more to him than you have stated as to these two pictures, "Hurry, Charlie, Hurry", and "They Meet Again"?

A. I did tell him, as I had previously mentioned, that if our theatre department was not going to exercise their privilege and use them under our own contract, why, I would be glad to sell them to him, but I would have to let him know about that because, after all, the pictures rightfully belonged under license contract to our own two theatres in Syracuse.

Q. When you say in your own theatre department, you meant RKO theatres in Syracuse?

A. RKO, New York, for the RKO-Schine theatres, Syracuse.

Mr. McClennen: I ask to have this marked for identification.

(Thereupon a memo, dated September 16, 1941, referred to was marked as Defendants' Exhibit D-168 for identification.)

Q. I show you Defendants' Exhibit D-168 for identification. Can you tell me what that is?

A. Well, that is a memo note report from Salesman Ed. Smith regarding the Strand Theatre, Syracuse.

Q. Did that paper come to your attention at about this time, September 16, or thereabout, 1941?

A. It is obvious that it did, sir.

Q. You have no independent recollection?

[fol. 4449] A. No. It must have been brought to my desk though. I see my own personal marking on it.

Q. There is a marking of yours somewhere on it?

A. Yes, this happens to be my writing (indicating exhibit).

Q. Did you have anything to do with the drawing of this line through the words "Hurry, Charlie"?

A. I may have but I couldn't exactly say that I did, sir.

Q. Did you have anything to do with the drawing of this line through the words "They Meet Again"?

A. That same would be true, sir, the same as "Hurry, Charlie, Hurry".

Q. Did you send this telegram, Plaintiff's Exhibit 831, on September 18, 1941?

The Court: That is in evidence?

Mr. McClennen: It is in evidence.

The Witness: We did.

Q. Up to the time of sending this telegram had there been any conversation between you and Mr. Wallace beyond what you have given as over the telephone as to "Hurry, Charlie" and "They Meet Again"?

A. I don't recall—I don't believe so.

Mr. McClennen: Will you mark for identification this paper?

(Thereupon carbon copy of letter, dated September 18, 1941, referred to was marked as Defendants' Exhibit D-169 for identification.)

[fol. 4450] Q. Was this letter, of which I show you a carbon, dated September 18, 1941, for identification as Exhibit D-169, written by you or dictated by you?

A. That was dictated by me, sir.

Q. Did you transmit to the New York office any application or contract for "Hurry, Charlie, Hurry" or "They Meet Again" for Mr. Wallace's theatre?

A. I did not, sir.

Q. Have you ever seen any contract with Mr. Wallace or with that Strand Theatre in Syracuse, containing any such pictures?

A. I don't believe I have ever seen any application.

The Court: You mean application by Mr. Wallace?

Mr. McClennen: By Mr. Wallace, yes.

Q. Do you know Mr. Fred Myers?

A. Do I know Fred Myers?

Q. Yes.

A. Casually, yes.

Q. Did you inform Mr. Wallace that Freddie Myers or Mr. Myers had insisted on having the pictures, "Hurry, Charlie, Hurry" and "They Meet Again"?

A. I did not say that, sir.

[fol. 4451] Q. Was Mr. Myers in the employ of R.K.O. in September, 1941?

A. If my recollection serves me right, I believe he left our company early in 1941.

Mr. McClennen: That is all.

Cross-examination.

By Mr. Wright:

Q. Mr. Lux, you began with R.K.O. as a salesman when?

A. In March or April of 1937.

Q. As a city salesman here in Buffalo?

A. Yes, sir.

Q. And how long did you cover that area?

A. Until I was promoted in either June or July, 1941.

Q. Then what was the area that you covered from March, 1937 until you became Branch Manager in 1941?

A. The area of Niagara County and parts of Cattaraugus and Chautauqua County.

Mr. Wright: Have you those exhibits that were identified?

Mr. McClennen: There are those, and you have the other one.

Q. These exhibits 166 and 167 for identification are the records that you made of your expenses during the weeks ending September 20th, 1941 and September 13th, 1941, respectively?

A. I have to make those every week, yes, sir.

[fol. 4452] Q. These were made by you?

A. Those were definitely made by me personally.

Q. As I understand it, according to these records you were in—you went to Albany on the 15th?

A. I believe that is a Monday morning, yes, sir.

Q. And you came back on the 16th?

A. Yes, sir.

Q. Do you remember which of those days it was that you had the telephone conversations with Smith and Wallace?

A. I believe it was late in the afternoon of Monday, the 15th.

Q. Do you have anything which helps you to fix that time other than your recollection?

A. No, I wouldn't have anything other than my own recollection, sir.

Q. And this memoranda, that is marked as Exhibit 168 for identification, when was it that you say that came to your attention?

A. This may have come to my attention either on Tuesday night, Tuesday evening or Wednesday morning, that would be September 16th or 17th. I go directly to the office when I return.

Q. How do you fix the date when this exhibit D-168 came to your attention?

A. Because it follows in line the negotiations that took [fol. 4453] place on Monday obviously between Smith and Wallace about which they called me.

Q. There is nothing on the document itself to indicate to you when you first saw if, is that right?

A. Well, it would have to be some time between that period, because he is giving in this letter a date for his opening, two pictures "Jungle Cavalcade" and "Flying Down to Rio" to open with on September 20th; shipment would have to be made on the 18th or 19th.

Q. The fact that "Jungle Cavalcade" and "Flying Down to Rio" were apparently dated for September 20th to 23rd

is what makes you feel you must have seen this before the 20th, is that right?

A. Yes, that is reasonable to assume that, the way we operate.

Q. But there isn't anything on the memo which would fix the date any better than that?

A. No, there isn't, sir, except a note "Ship Jungle and Rio, to arrive September 19th,—which would mean he possibly would have got this letter out on the 15th with the assumption that we would have to ship it on the 17th to have it there by that date.

Mr. Wright: By the way, is Mr. Smith going to testify?

Mr. McClennen: Mr. Smith, I believe, is going to testify. There won't be time this afternoon.

[fol. 4454] Mr. Wright: If the Court please, we ought at least to see what Mr. Smith's testimony would be before we conclude any cross-examination of Mr. Lux. We would be glad to go as far with him now as we can, but we would want the opportunity to question him again after Mr. Smith testifies.

Mr. McClennen: There is no objection to that, if we can take it on a day when Mr. Lux is otherwise in Buffalo.

By Mr. Wright:

Q. Now, the parts on here that you can identify as in Mr. Smith's handwriting are what?

A. Well, it is all Mr. Smith's handwriting with the exception of that "O.K." That is $8.00, that is my heavy pencil.

Q. You write the "O.K."?

A. Yes, and also this here is my handwriting "Letter to Cleveland 9-24 to home office", indicating I must have borrowed it from Cleveland probably.

Q. The 9-24 would indicate the date you made the call to Cleveland for the print?

A. No, it probably indicates Cleveland was to ship us a print on the 24th, and after I got through with it I was to send it to the home office, probably a borrowed print.

[fol. 4455] Q. And the $8.00?

A. Is probably the price of this news. I probably was interested in it and made a note of it.

Q. Otherwise the handwriting is all that of Mr. Smith?

A. With the exception of this.

Q. With the exception of what you have just stated?

A. Yes, sir.

Q. These lines that are drawn through the notations "Hurry Charlie" and what is this?

A. Argentina.

Q. And "They Meet Again", you don't know whether you wrote those or Smith or somebody else?

A. I may have stricken those out knowing that they could not be served.

Q. You are not able to testify from looking at it?

A. Not exactly that I did that.

Q. Whether you drew those or Smith did, or somebody else?

A. I could not say, I wouldn't know except to say knowing I could not serve those pictures they would be obviously crossed off.

Q. I will show you these forms entitled "Special License Agreement" that have been marked in evidence here as Exhibit 819. Do you recognize the forms?

A. That is an application, a memo application form, Exhibitor's copy.

[fol. 4456] Q. And when those are made up, the original there, is an original made at the same time?

A. Usually there is.

Q. And that original form is the same as this, is it?

A. Yes, should be.

Q. Or is it a different color?

A. It is a different color, sir.

Q. What color is it?

A. Well, there are five or six copies to this contract. There is the white, blue, pink and brown, and I couldn't say, some other color, anyway.

Q. What happens to those other colored copies?

A. Usually this is made in duplicate. The exhibitor would sign all seven copies and the application is sent from the branch then, after the salesman transmits it to the branch.

Q. You leave one copy with the exhibitor and take six back to the branch, is that it?

A. That is right, sir.

Q. What do you do with the six the branch gets?

A. Well, we take the duplicate of this and usually type the other five copies so they are clear and legible and then submit them to the home office for consideration and approval with our recommendations as to whether or not we

feel they are equitable contracts and whether they should [fol. 4457] be accepted.

Q. If they are approved, what happens?

A. If the contract is approved, we are notified by our home office and we in turn approve to the exhibitor.

Q. You do that how?

A. Usually by telegram and it is followed up with the approved copy of the contract which bears the home office stamp of approval.

Q. That goes from where to where?

A. The home office copy would be stamped in New York, forwarded to the branch and then forwarded to the exhibitor with an accompanying letter.

Q. You would also have a copy in the branch?

A. Usually retained a copy in the branch.

Q. The other five copies at the branch?

A. Usually retain the other five copies in the branch.

Q. And before you came here to take the witness-stand, did you make any search to determine whether you had any copies in the branch there of these five license agreements that are marked Exhibit 819?

A. No, a short time ago I looked up one contract in connection with, I believe, a five-picture contract; I recall looking at it recently, but I haven't looked at any four or five copies.

Q. Will you repeat the question?

[fol. 4458] A. I did not.

Q. And do you know whether you have any such copies there?

A. It is possible we might have a copy in the files. That is, if it is an approved contract. We don't usually save all memo applications if they are rejected, because when they are re-negotiated the useless copies would be probably destroyed because they have no bearing on our records.

Q. As to those that are approved?

A. We would have a copy or the approved copies.

Q. Before you return to the witness-stand, will you make the search and see if you have any?

A. If you will give me a specific list I would be glad to.

Q. If you have copies of contracts which you have in front of you, you can take the exhibit along, if you want to.

A. Yes, I will take it along and check it.

Mr. Wright: Do you want to adjourn at 4 o'clock?

Mr. McClennen: Yes, could we adjourn now?

The Court: Do you want to adjourn over the first of the week?

Mr. Wright: As I understand it the adjournment now is until Wednesday morning.

The Court: You don't want to work on Election Day?

Mr. Wright: I have that argument in Washington which [fols. 4459-4460] is for the 6th and 7th.

The Court: Very well, we will adjourn until Wednesday morning, at 10 o'clock.

(Whereupon, a recess was taken until Wednesday, November 8th, 1944, at 10 o'clock A. M.)

[fol. 4461] UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

Civil 223

UNITED STATES OF AMERICA

vs.

SCHINE CHAIN THEATRES, INC., et al., Defendants

Continuation of trial before Honorable John Knight, United States District Judge for the Western District of New York, November 8, 1944, 10 o'clock A. M.

APPEARANCES:

Robert L. Wright, Esq., John F. Clagett, Esq., Harold L. Schilz, Esq., Philip Marcus, Esq., Special Assistants to the Attorney General, and Milton Kallis, Esq., Special Attorney, in behalf of the United States.

Edward F. McClennen, Esq., Willard S. McKay, Esq., Saul E. Rogers, Esq., Arthur E. Whittemore, Esq., Arthur J. Homans, Esq., and Howard M. Antevil, Esq., appearing for the Defendants.

[fol. 4462] PROCEEDINGS

Mr. McClennen: If the Court please, I have asked to have marked as Defendants' Exhibit 170 for identification, from the files of Warner, a carbon copy of a letter of September 9, 1935, from M. A. Mooney, Branch Manager, to M. H. Breyer, Secretary of State Theatre, Bucyrus, Ohio. And as

Defendants' Exhibit 171 for identification a percentage report from the files of Warner, signed by M. H. Breyer, for the percentage on the play of "Page Glory" under contract 4447, at the State Theatre, Bucyrus, on September 8th to 10th, 1935.

(Thereupon the carbon copy of letter, September 9, 1935, referred to was marked as Defendants' Exhibit 170 for identification.)

(Thereupon the Warner Bros, percentage report, Cleveland Exchange, September 8th to 10th, 1935, was marked as Defendants' Exhibit D-171 for identification.)

Mr. McClennen: I offer these two in evidence.

Mr. Wright: As far as I know, there has not been any prior identification of these documents. I assume some-
[fol. 4463] body from Warner Bros. might be able to establish the identity. As far as the letter of September 9th is concerned that also appears to be a copy and I suppose there ought to be some showing as to the unavailability of the original. I see no objection to having these marked at this time, but I do not see that they have been made competent by Mr. McClennen's statements, and we would like to reserve——

The Court: Did not the defendant consent to the introduction of these other documents as coming from the records of the Company? Certain of these were consented to before. Was there a question raised about that?

Mr. Wright: We identified all of the documents that we offered as having come from the records of the company by witnesses who appeared and said that they did. I have not any reason to doubt that these did come from the files of the company, but, again, this is a matter concerning correspondence with Breyer, a report that is supposed to have been sent in by Breyer.

The Court: Do you object to them?

Mr. Wright: At this time I object to having them offered
[fol. 4464] in evidence.

The Court: Objection sustained. They are not sufficiently proven.

[fol. 4465] Mr. McClennen: If your Honor please, I first press Exhibit D-171 which shows by comparison of signatures of exhibits already on file as signed by M. H. Breyer.

The Court: I can't compare the signatures. How can the Court do that?

Mr. McClennen: It is obvious on inspection of the exhibits, if your Honor please.

The Court: No.

Mr. McClennen: Then I will state that these papers were received from the attorney for Warner Brothers in New York, having been collected from the files of Warner, and I ask if Mr. Wright is going to make me have him come to Buffalo to state that fact, or will you accept my statement?

Mr. Wright: That will depend entirely on what we are able to learn about these papers from Mr. Breyer. If Mr. Breyer says he got the original of this letter and that he signed this statement, I think that no further identification would be necessary, but, of course, we want to make the check with him.

The Court: If the attorney is called to the stand he can [fol. 4466] testify they were taken from the records of the Company.

Mr. McClennen: Yes, if your Honor please.

The Court: And Breyer's testimony might and might not be material. That would not affect the introduction of the exhibits as showing they were received except the introduction of the copy.

Mr. Wright: I don't think there is any occasion on the admissibility of the documents at this point, anyway, because we haven't any one on the stand who had anything to do with this situation.

The Court: You had better have the attorney come.

Mr. McClennen: That is, have some one come from New York to identify them?

The Court: Yes, proceed.

Ned E. Depinet a witness called by and on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. McClennen:

Q. What is your residence?

[fol. 4467] A. I live in Greenwich, Connecticut.

Q. What is your position?

A. I am President of R.K.O.—Radio Pictures, Inc.

Q. When did you enter the motion picture distribution business?

A. In the fall of 1907.

Q. In what capacity and with what company?

A. Well, I worked for a man named Pierce who had a film exchange in New Orleans, Louisiana. I was the shipper and film inspector and booker and errand boy, and so forth. There were about four of us in the office.

Q. Will you with approximation of dates briefly state your relationship to this business down to the time when you came into the employ of R.K.O.?

A. Well, I worked in New Orleans in that office that I have just mentioned for a couple of years. The industry was beginning to grow and I finally was sent out on the road as a salesman in 1909 and traveled through the South. Along about 1912 or '13 I became a Branch Manager and a year or so later Southern District Manager which position I held until 1924, when I came to New York as one of the sales managers of Universal Film Company, remaining there a year or so and became the General Sales Manager and Vice President of First National Pictures where I [fol. 4468] remained until that Company was purchased by Warner Brothers, and I remained there a couple of years longer under the ownership of Warner Brothers, and eventually joined R.K.O. in 1931.

Q. I am not sure, were you with Pathe before it became R.K.O.?

A. R.K.O. owned two producing and distributing organizations when I joined them, and the one I joined was called R.K.O.-Pathe, and I became the Vice President and General Sales Manager of that Company when I joined the organization.

Q. And you have occupied that position of Vice President and General Sales Manager of R.K.O. from 1931 down to what date?

A. Down to about two years ago when I was made President.

Q. Did you then remain as General Sales Manager?

A. No, but I have always specialized on distribution and still do.

Q. When you first came to R.K.O. in 1931, it was already the owner of theatres?

A. Yes, R. K. O. owned theatres, R.K.O.-Pathe; the first company that I joined did not own theatres.

Q. You had to do with the distribution end of the business and not the theatre operating end of the business?

A. That is correct.

Q. When you began whose production of pictures was [fol. 4469] R.K.O. distributing?

A. Well, R.K.O. was distributing pictures that R.K.O. produced and pictures that R.K.O.-Pathe produced. They had two studios.

[fol. 4470] Q. At that time was it distributing any pictures of other producers than those two?

A. Well, I am not clear as to that at that time, at that particular time. I don't know whether they had any outside pictures independently produced or produced by other people at that time or not.

Q. Confining yourself now to the period from 1931 to May 19, 1942,—and I am selecting that date not because of any supposed change in your business, but because of the course that this case is pursuing—will you state the sources of the product that RKO has from time to time distributed?

A. Until what date?

Q. From 1931 to May 19, 1942.

A. Well, the sources of the various product that we distributed during that period among others were Pathe News, March of Time, both produced by other companies; all of Walt Disney's products, both short subjects and features, such as "Snow White and the Seven Dwarfs" and others that he produced; the product of RKO Radio, which the company produced at its own studio; Samuel Goldwyn's pictures during that period; Sol Lesser's pictures, I believe, during that period; and then there were several other independently produced pictures that we distributed, all of [fol. 4471] which I cannot recall at the moment.

Q. And when you say "during that period" I take it you mean from time to time during that period and not all of those over all of that period?

A. Of course. We may have just had one from one of those sources during that period. A man named Deterle produced pictures for us during that period. Another outfit made some Dr. Christian pictures, which we distributed, and another concern made pictures of that very homey New England character——

Q. We do not like to concede that there are any such.

The Court: He said "homey", not "homely".

Mr. McClennen: Then I will withdraw my remark.

A. This was a very nice character on the screen. I can't think of his name. There were a series of six of those. Scattergood Baines, that was the gentleman's name. There were six of those. I only distributed them for several years.

Q. In the theatre exhibition department of RKO who were the persons with whom you came in contact for that department in the superior positions?

A. Well, over the period of time since I joined the organization, is that what you mean?

Q. Yes.

A. Well, there was Joe Plunkett and Senator J. Henry Walters, Harold B. Franklin, John O'Connor, Jules Levy, [fol. 4472] Phil Reisman, Freddy Myers and Eddie Alperson.

Q. Do you happen to remember the period when Freddy Myers was with RKO?

A. Very well.

Q. What was he?

A. Well, Fred was there when I joined the Company. He had previously worked for me in New York as a salesman when I was in charge of First National. So had Jules Levy. So I am quite familiar with their activities. They both left First National to join RKO when Joe Plunkett took over the theatre department. Jules was the head of the film booking department and Freddy was one of his first assistants.

Q. How long did Freddy Myers stay with that department?

A. Well, he stayed until 1941. I think it was May, 1941, when he resigned to join Universal.

Q. Where you—and I am using you as RKO—distributed pictures of other producers what was the practice with respect to the obtaining of the approval or not obtaining the approval of those producers?

Mr. Wright: If the Court please, I do not like to interrupt, but the relevancy of this line of inquiry is not apparent to me.

The Court: Read the question again.

[fol. 4473] (Question read.)

The Court: Obtaining their approval; that is the question. Obtaining approval to use the other pictures, you mean?

Mr. McClennen: The approval of the distribution contract; that is, if a contract came in, or an application came in to RKO's central office for, we will say, X theatre in the town of Y, and the production was that of some one other than RKO, what was done, if anything, with respect to obtaining the producer's aproval before making the contract?

A. Well, there were two different arrangements. With some of the producers they retained the right to approve every exhibition license. Others grant us the right to approve it. For instance, Samuel Goldwyn, we can negotiate a license and if he likes it he can accept it. If he wants to sell his pictures otherwise or to some one else the final right remains in his hands.

Q. What has been the practice with reference to the product which RKO was distributing, so far as the playing of those pictures in RKO's own theatres is concerned?

A. Well, RKO's theatres negotiated for those pictures [fol. 4474] just like any other exhibitor.

Q. And were the terms, the price per picture, or the percentage per picture, the clearance, and what not, a matter of negotiation between the distributing department and the theatre department?

A. Oh, yes.

Q. What do you have to say about the approval of distribution contracts, either to your own theatres or to other exhibitors?

A. Well, I carry the responsibility of approving all contracts. My name is signed to the license agreements. Of course I am only human and I have to have assistants to help me to carry out and perform my duties. But the final authority rests in me.

Q. Will you state the sales policy of RKO, as you have pursued it, in respect to the dealing with theatres affiliated with other distributors and theatres of independent circuits and theatres of one-theatre operators in the negotiations for your product, the places where they are carried on, any distinctions between the different classes of negotiations, and the considerations determinative of your making contracts with particular theatres where there were other theatres in the town available as a possible customer? Will you state that, with any changes that may have occurred

[fol. 4475] in the course of the period, if there have been any, and as fully as you can, carrying that question in mind?

[fol. 4476] Mr. Wright: If the Court please, I think the question is at least triple barreled.

Mr. McClennen: If it is objected to I will not press it. I thought it would be a great saving of time.

Mr. Wright: A matter of clarity.

Mr. McClennen: I am not going to press the question.

Mr. Wright: It isn't a question of saving time, it is a matter of clarity.

Mr. McClennen: I am not going to press it if you object.

Mr. Wright: We do object.

The Court: *The question is withdrawn.*

Mr. McClennen: I do not press it. I withdraw the question.

Q. Mr. Depinet, where there are two theatres or more in a city or town possibly available for the first-run or subsequent-run of your pictures, what is your policy with respect to determining to which you will try to sell or consent to sell?

A. Well, our principal desire in the distribution of our pictures is to place them with an exhibitor who we know to be a fair dealer, a reputable operator, a good, live showman. Naturally, the accessibility of his theatre, the reputation of his theatre, the convenience of his theatre, the amount of money that can be earned by a picture in his theatre, his willingness to advertise and establish the pic- [fol. 4477] ture for the surrounding theatres in that locality, all play an important part. Being in the commercial business we desire to get as much revenue as we can, leaving fair and reasonable amount for the theatre, because without that it can't exist. I think those are the principal considerations.

Q. In applying those considerations what weight do you give to the isolated consideration that the theatre is operated by a producer affiliated circuit or an independent circuit or a one-theatre operator?

A. Well, the principal considerations that I have just given you in the sale or licensing of our pictures we have certain policies which are determined when the picture is produced, and we know what it is and the customer who is willing to abide by those terms and if all of the other considerations are satisfactory, why, that is the fellow we do

business with and, naturally, the large customer is important to us but he has a lot of brick and mortar which isn't any good to him without film, and we have film that isn't any good to us, except for the theatres, so we deal with him like anybody else, and eventually we get together. We don't permit him to take advantage of us and he does not permit us to take any advantage of him. It wouldn't make any difference to me whether he was an independent or a chain [fol. 4478] operator in the licensing of my pictures if he could leave up to the requirements and it was the best place to sell.

Q. Where there is only one theatre in the town, and if it is a theatre, striving to operate on the best type of pictures, what is your competition for that business, from what other distributing companies?

A. Well, there are plenty of competition. There is the Paramount Company and Metro-Goldwyn-Mayer, Warner Brothers, 20th Century-Fox, Universal, United Artists, Columbia, Republic, Monogram and independent distributors and the British pictures.

Q. In the general run of production, there is no question that some of those companies that you have named do a better job than others of them; their product is more desirable?

A. Yes, but there are various types of theatres, and some of them what you might call smaller companies are producers of product that is more valuable in some of those one-theatre towns; for instance; Western pictures in — Republic and Monogram specialize, are most popular in the little towns of the South and West, and sometimes those exhibitors prefer those pictures to our big, expensive pictures. There are various types of theatres and various types of pictures that are popular in different theatres and [fol. 4479] different localities. You probably wouldn't want to see a "Lum 'n Abner" picture. But down in Kentucky they break all records and there are various sections of the country in which certain pictures do not appeal, and when you go out with all the film there is on the market in one town, you have plenty of competition.

Q. When did the plan of clearance of first-run for its protection against subsequent-runs first come into substantial use?

A. Well, to the best of my recollection it came along with the advent of the feature film, that is, the film of five reels

in length, or longer, and as our industry grew. At the beginning there might be one theatre in a town or locality and then as other theatres sprung up, for the orderly conduct of our business, for the convenience of the public, for the protection of our revenue, we had to adopt some sort of a schedule for the playing of the pictures in the various theatres and that slowly developed into the present clearance.

Q. What are the considerations which influence you in determining the length of that clearance?

A. Well, that clearance is negotiated with the exhibitor. History probably has something to do with it, the locality of the theatre, whether it is on the other side of the river [fol. 4480] or the street car runs by there. There are many things that determine the length of clearance. It varies in almost every city. It is hard to define just what it is. You want to get all the revenue that you can out of the first house and then you move onto the second and you want to do the same job there and this clearance is to space the showing of the film. Price has something to do with it, naturally. The first time a picture is shown downtown the admission price is higher and as a general rule, although not always, the admission price lowers as you go along. The public want to know where they can see pictures at various prices, and by this clearance system we make the same picture that might be shown for a dollar in one house so eventually the poor man may see it in a ten-cent house somewhere by spacing the clearance. And then the number of prints is important. We couldn't possibly handle our possibly sixteen thousand theatres with a reasonable number of prints unless the exhibition was divided in some way, such as it has been through the development and growth, the history of clearance.

Q. You mentioned sixteen thousand theatres. Was that just for illustration, or does it betoken the number of theatres you are selling to?

A. I mention that because the War Activity Committee [fol. 4481] of the motion picture industry in its endeavor to cooperate with the Government in this emergency has taken steps to contact the theatres, have them pledge support, and, I think, it is slightly over sixteen thousand exhibitors that have signed up to help the Government, so, assuming that any American would do that, I would say there would be slightly over sixteen thousand theatres.

Q. Do you bear in mind approximately how many of those theatres, say in 1941, R.K.O. licensed to?

A. Varied number, depending upon the quality and popularity of the picture from maybe as low as eight thousand up to fourteen thousand, or more.

Q. You have spoken of the interest in your revenue. It is obvious in the case of the percentage picture how you are interested in the gross receipts of the theatre showing your picture first-run. Will you indicate in what way you are interested in that revenue in the case of flat rental pictures, either currently or for future prospects, or otherwise?

A. Well, film rental is a percentage of the receipts regardless of how the exhibitor pays it to you.

Q. Will you stop right there and indicate just what you mean by that?

A. Well, I mean by that that if a man takes in a thousand [fol. 4482] dollars and gives you 35 per cent of it, it is $350. If you sell it to him for flat rental for $400 and he takes in a thousand, you have received 40 per cent of his receipts. The exhibitor whose purpose it is to buy as reasonably as he can sometimes believes that he can buy more reasonably through flat rental, and if he is willing to pay a reasonable flat rental, why, we don't want to be arbitrary about it in every case. Sometimes we let him buy it the way he wants to buy, but we still get a percentage of the receipts, maybe lower than our regular terms, maybe a little higher, depending on the trading ability of the exhibitor and the distributor.

Q. When you have agreed with him on a flat rental and the picture is a flop at his theatre, what is the common occurrence?

A. Well, he comes in and asks for an adjustment and generally he gets it, if there is fairness in his plea.

Q. In fixing on the flat rentals for a particular theatre in this year what, if any consideration do you give to what have been his gross receipts in a prior year on pictures?

A. Well, naturally in establishing what we think is the fair flat rental we take into consideration and use for our calculation his grossing prospects, and we know pretty [fol. 4483] well what a certain theatre ought to gross with a certain picture and the rental is always based on a percentage of the receipts that will give us an adequate rental,

leaving him his expenses, plus a reasonable profit. We don't try to get the last dollar, because there is no sense in putting him out of business.

Q. You have several times mentioned 35 per cent. Was that selected just for illustration or is it a significant figure?

A. Well, it is significant in that for quite some time 35 per cent has been a basic figure around which you work. Sometimes you go higher and sometimes you go lower, depending on the quality and drawing power of the picture.

Q. When you sell a picture to a theatre first-run, and also second-run, what, if any, influence does the agreed figure for the first-run have upon the figure for the second run?

A. When you say "figure," what do you mean, Mr. McClennen?

Q. Well, I mean——

A. The film rental?

Q. The film rental, yes, that is what I mean by that, the film rental?

A. They don't have any influence on each other. Each theatre is a separate entity. One theatre may have for unusual reasons a very heavy overhead, another theatre [fol. 4484] may have a cheap overhead. Our calculations are primarily aimed at a rental which will give us a reasonable return and leave a reasonable amount with the exhibitor.

[fol. 4485] Q. If both runs are sold to one theatre——

The Court: I did not understand your answer to that question as being an answer to the question put. Your question was where they continue the run beyond the first run in the same theatre?

The Witness: I did not understand it that way.

The Court: What was the rental charge?

Mr. McClennen: I did not mean a continuance in the sense that we have referred to it at other times.

My Mr. McClennen:

Q. Let me put you this question: In a given town there is a theatre X and a theatre Y. The considerations are obvious that make you want to put your first-run into theatre X. Theatre X and theatre Y both would like to get the second-run in the town 30 days or 60 days, or what not, after the first-run. In determining the film rental for the second-run to X how much do you take into consideration, if at

all, the fact that X is buying the first-run also, and what considerations do you have to determine what in that competition for the second-run will determine what you should do with theatre Y?

A. Well, I don't quite understand that question.

Q. I am assuming that X is in one ownership and Y is in [fol. 4486] another ownership entirely independent.

A. Those are both second-run theatres?

Q. No. X is a first-run theatre that, for pressure of product or for other reasons, has to have the second-run perhaps as a second feature or otherwise on other pictures, but for business reasons wants to get the second-run. Now, when you negotiate the first-run under those circumstances, do you ordinarily negotiate it at the same time that you make the first-run contract?

A. Yes, I think you would in an instance of that sort.

Q. How much are you affected in determining whether you shall let Theatre X have that second-run by the fact that X is paying for the first-run the price fixed for the first-run?

The Court: How does that affect the question of the rental as between X and Y for the second-run?

Mr. McClennen: First as to how they arrive at the rental for X.

The Court: In view of the fact that they are also contracting for a second-run, you mean?

Mr. McClennen: In view of the fact that they are the contractor for the first-run.

A. Well, as clearly as I understand your question, they are two separate transactions and would be dealt with and treated separately. There is an advantage to us, perhaps, [fol. 4487] in having the first-run also play the second-run. He would be more apt to protect—or, rather, not hinder the first-run by the second-run operation. They would probably allow sufficient clearance and there would be advantages in putting the picture over better because he knew it would come back eventually and play again in his second-run theatre; but the two deals would be negotiated individually and be determined on their merits.

Q. In dealing with circuits of theatre are they ordinarily dealt with in one negotiation or a series of negotiations for the season?

A. Well, not today. Today we try to sell every picture individually.

Q. I forgot to call to your attention that we are not talking about today in the case. I will take it, for illustration, in the year 1939.

A. Well, at that time circuits were sold in different ways. Some circuits that had a central buying place where you made a deal after negotiations, individual negotiations, for each theatre, might do it at one place. Other circuits were divided and had offices in different parts of the country. There was not any set rule about it. The only set rule was that you took up individually every theatre and sat down and negotiated for that particular theatre, whether you [fol. 4488] did it all at one time or whether you did it at different places or at the same place.

Q. The plaintiff has adopted as the definition of a franchise, for the purposes of this case, a contract covering more than one season's production. Without attempting to commit you one way or the other to the correctness of that definition, just assume it in the questions that I put to you from now on.

Are franchises a common or an uncommon thing with RKO?

A. Well, they are very uncommon today. There was a time——

Q. Again I will say in 1939.

A. There was a period when we had quite a few. That was in the early days that I was with the company, but in the main the theatres covered by franchise were a very, very small number of the total theatres that we supplied.

Q. In issuing those franchises was any distinction made between producer-controlled theatres, independent circuits and individual theatres?

A. Not to my knowledge.

Q. In dealing with individual theatres in competition with the other large producers, there were times, were there not, when some of the other large producers were supplying to the theatre which RKO did not supply?

A. Will you read that, please?

[fol. 4489] (Question read.)

A. Of course.

Q. Were any efforts made, as a matter of your policy, to get that theatre to take a franchise from RKO?

A. Well, RKO over the period of years has made a determined effort to sell or license its product to every theatre in America, regardless of who else was selling pictures there, and we try to sell the theatres that we think would make good customers and that we think our product should play in, regardless of what else the exhibitor may have had.

Q. What were the advantages and disadvantages, if any, of either to you in your selling policy in giving franchises to independent theatres?

A. Well, at the time we felt that a franchise would give us a continuous source of exhibition for our pictures in that particular theatre. It saved us the expense of going back and selling them each year. It gave us a sense of security in the production of our pictures. We knew we had an outlet.

Q. And would the same considerations apply to your giving a franchise to a circuit of theatres?

A. Of course they are all theatres to us regardless of who owns them.

Q. I confine myself now to the matters of your personal [fol. 4490] knowledge and not what you have been told by anybody else. To your knowledge has there been any conversation with any of the defendants in this case or their executive or employees not to deal with any competing exhibitor, or to restrict the terms of such dealings?

A. No, sir.

Mr. Wright: If the Court please, there is not any showing so far that this witness would have any occasion to have such knowledge, if it had occurred, and he is also drawing a conclusion here as to what the effect of some conversation might or might not be. The form of the question, I believe, called for whether he knew of a conversation to the effect that such a thing had happened. Now, I submit that he is not in any position to answer such a question and that it is a conclusion.

Mr. McClennen: The precise question was put at page 4381 and admitted by your Honor.

The Court. I take it that there is the question of his being in a position to know whether such a conversation was had. The other thing is whether it calls for a conclusion. You have to assume that he has some knowledge that contracts [fol. 4491] were made for the distribution of pictures.

Mr. Wright: I would agree in assuming that he might have some knowledge of the contracts. There has not been any showing that he had any knowledge whatsoever as to the negotiation of any particular contract that is in evidence here.

The Court: He goes farther than that. You might assume by reason of his position as President he might have some knowledge of some negotiations at the time.

Mr. Wright: I suppose that would depend on the facts of the particular contract.

The Court: You may inquire as to his own personal experience, what he has done with reference to the negotiation, what he has known personally of the negotiation of contracts from time to time, and what he had to do with the negotiation of contracts. I think that is true, but I think it might be reenforced by something more definite as to his opportunity for knowledge.

By Mr. McClennen:

Q. Mr. Depinet, you have known from 1931 to May 19, [fol. 4492] 1942, have you, that your company was making contracts with the various theatres, or some of them, from time to time, of the Schine Circuit?

A. Yes, sir.

Q. You have had those contracts come up to you for approval?

A. Yes, sir, I visited Gloversville myself and talked about contracts.

The Court: Have you negotiated from time to time with the Schine people with reference to contracts?

The Witness: Yes, sir.

The Court: Objection overruled.

Mr. McClennen: That is all.

Cross-examination.

By Mr. Wright:

Q. Mr. Depinet, in addition to yourself, there were at various times during this period, were there not, a number of others who engaged in the negotiation of contracts with the Schine Circuit?

A. Oh, yes, sir.

Q. And, in general, what you did was simply to place the final approval on whatever deals were worked out; isn't that right?

A. Nobody else had any authority to license any of our pictures but myself.

[fol. 4493] Q. I understand that, and what you did in these deals was simply to approve the deal that was finally made?

A. Well, now, Mr. Wright, as head of the distribution I do more than just sit there and say yes or no.

Q. I understand you attempt to satisfy yourself——

A. I lay out the policies——

Q. Just don't interrupt. Let me finish the question. As I understand you, you, at the time you approve any contract, or any one that is important, attempt to satisfy yourself from whatever information you have at hand that the contract is the kind you ought to have or the best you can get? That is right, isn't it?

A. Yes, sir.

Q. All of this general procedure you outlined I suppose represents what you like to do or what you try to do; isn't that correct?

A. I don't understand what procedure you mean.

Q. Your previous testimony, in which you went over the policies of the Company in general situations.

A. No, it is what we do do.

Q. You never have any variations from the policy as outlined; is that right?

A. Well, any policy is flexible, Mr. Wright. We adhere to that policy to the best of our ability. There are a lot of ways to skin a cat and if we have to make a change here [fol. 4494] or there to get the same result we do it.

Q. Your performance, of course, in particular situations, I suppose varies widely from what you set up as the ideal; is that correct?

A. I don't know as to that. I wouldn't agree to that—widely. It may vary, but I don't know how widely it varies.

Q. Or the extent of the variation, I suppose it would depend on a rather careful analysis of all the contracts you made with what you set out to do; isn't that right?

A. No, our desire is to make a license with an exhibitor that gives us a fair rental and leaves him a reasonable return. That is our policy and that is what we adhere to. We

do it in different ways, but that is the way we end up or at least try to end up.

Q. And I suppose it would be impossible to say how often you ended up that way, without a study of the exhibitor's books for that matter, wouldn't it?

A. Well, those come into play. When he comes in and wants help he brings his books.

Q. That does not quite answer my question.

A. Yes, his books and our knowledge of his theatre. There is no great mystery about the operation of a motion picture theatre.

Q. In your general efforts to get what you regard as [fol. 4495] favorable terms you try to get whatever the product you think you are selling is worth? Isn't that about what it comes down to?

A. Up to the point that we try to get all that we can get and still leave the man a reasonable part of the receipts.

Q. And in terms of percentage and flat rentals your terms vary quite widely, in accordance with what you regard as the value of the particular exhibition that you are selling; isn't that right?

A. The particular theatre.

Q. And the particular run and the theatre it is playing in, I suppose?

A. Yes, that is true, but different theatres cost different amounts to operate. Some theatres can pay a higher percentage than others, due to the overhead, due to the rents, and so on.

Q. In general, is it not a fact that you do not expect to get as big a share of the distributor's receipts for the less desirable runs and pictures than you expect to get for the first runs of the top pictures?

Mr. McClennen: Mr. Wright, I think you meant exhibitor. You said distributor's receipts.

Mr. Wright: Yes, I will change that.

A. Well, that does not hold true. We expect to get a percentage of the receipts for the exhibition of our pictures [fol. 4496] in a given theatre that will leave the exhibitor a reasonable sum and give us a reasonable sum. Now, as I have said before, some theatres can pay a higher percentage and still end up with a better profit than other theatres.

Q. I understand what you said before. Will you read the question and see if we can get an answer to the question?

(Question read as follows:

"Q. In general, is it not a fact that you do not expect to get as big a share of the exhibitor's receipts for the less desirable runs and pictures than you expect to get for the first runs of the top pictures?")

A. Well, the percentages would vary. The amount of money paid varies because in the big theatre you get a much larger sum of money than you do in the smaller theatre.

Q. Your answer to the question is no? You expect to get, do you, just as much in the way of percentage, just as high a percentage of the exhibitor's gross, whether you are selling him a last run in one of your bottom brackets or whether you are selling somebody first-run on one of your top bracket pictures; is that right?

A. No, that is not what I said. You talked about top pictures. I will say this, that the older the picture gets, or the older the run is, the rental naturally diminishes as the [fol. 4497] receipts of the theatre diminish.

Q. And the percentage of the receipts that you get as film rental also diminishes, does it not?

A. Yes, to an extent it does, yes.

Q. You testified generally, I believe, as to clearances. Did you take any part in negotiating any of the clearances that are involved in this case, any of the clearances with the Schine Circuit?

A. I don't believe I did.

[fol. 4498] Q. And I believe you also testified as to your general policy in selling circuits of various types and independents, that you treated them the same?

A. That is right.

Q. And in your selection of a particular theatre, or your sales as to particular theatres in a particular locality, your general policy would be to negotiate on a theatre against theatre basis, is that right?

A. That is right.

Q. And, of course, the extent to which the policy was carried out, and the extent to which variations occurred would only appear from an examination of what happened in particular situations, isn't that right?

A. I imagine that is correct.

The Court: Just one question. You spoke about the question of variation of percentages from the percentage on the first-run pictures to percentage on the later runs of the same picture in perhaps a smaller theatre. You said it made a difference to some extent. What do you mean by that? There is evidence in this case of some charges for smaller theatres that seem to be in excess of that charge for the first-run pictures.

[fol. 4499] The Witness: Well, what I meant by that was this—I thought I was answering his question—there are certain pictures on which the terms are cut and dried for every theatre in America, and it doesn't make any difference if it is the one hundredth run or the first run.

The Court: The figures are cut and dried?

The Witness: As to the terms. Maybe it is a so-called 50 per cent picture, and the producer and distributor will not play it anywhere except under those terms. Then there are other pictures which are not so expensive, not so good and which, like any other merchandise, the price may be lessened somewhat as it gets older and plays in older theatres, but basically, your Honor, the distributor tries to get a percentage of the income of a theatre and it might be the fifteenth run in a town, but the company figures its gross possibilities. It might earn you more than the fifth or eighth or tenth run. That happens.

The Court: You said, "To an extent." I didn't know what you meant by that.

[fol. 4500] Mr. Wright: I missed your Honor's earlier comments, and could you read me what the Judge said before?

The Court: The answer with respect to comparative prices and later runs. I mean, rentals, and he said "To an extent that affected the difference in rentals."

You can go back there, if you want to.

(Reporter then read the following:

"The Court: Just one question. You spoke about the question of variation of percentages from the percentage on the first run pictures to percentage on the later runs of the same picture in perhaps a smaller theatre. You said it made a difference to some extent. What do you mean by that? There is evidence in this case of some charges for smaller theatres that seem to be in excess of that charge for the first-run pictures.

The Witness: Well, what I meant by that was this—I thought I was answering his question—there are certain pictures on which the terms are cut and dried for every [fol. 4501] theatre in America——")

The Court: I mean rentals.

Mr. Wright: I heard the answer.

I think that is all.

Mr. McClennen: That is all, Mr. Depinet.

The Witness: Am I through?

Mr. Wright: Yes, sir.

The Witness: Thank you.

Mr. Wright: I might say in reference to the Warner exhibits it won't be necessary to have any one come here. My associates called my attention to the fact in the past we had a letter from the distributor representative identifying them. If some one will give us a letter what they are, and where they came from that will be sufficient.

The Court: All right.

Mr. McClennen: This remark refers to Defendants' Exhibits for identification D-170 and D-171.

The Court: You mean not to receive them now, but await the letter?

Mr. Wright: The letter should be sufficient to establish they came from the files. We reserve our objection as [fol. 4502] to impeachment of the witness on the ground that it should have been brought to the attention of Breyer when he was on the stand. It is the same thing that applies to the other documents produced.

The Court: Do you offer them now?

Mr. McClennen: I will offer them now giving the assurance that the letter will be forthcoming.

The Court: All right.

Mr. McClennen: Then these exhibits become Exhibits D-170 and D-171 in evidence.

(Thereupon copy of letter dated September 9, 1935 to Breyer from Mooney, previously marked as Defendants' Exhibit D-170 for identification was received in evidence.

(Thereupon Warner Brothers' percentage engagement report signed by M. H. Breyer, dated 9-8-10, previously marked as Defendants' Exhibit D-171 for identification was received in evidence.)

[fol. 4503] WILLIAM F. RODGERS a witness called by and on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. McClennen:

Q. Where is your residence?

A. Rye, New York.

Q. Your position?

A. Vice President and General Sales Manager of Loew's, Inc.

Q. When did you enter the motion picture distribution industry?

A. In the spring of 1910.

Q. Will you trace that down, briefly, by time, position, employer, until you came into the employ of Metro-Goldwyn-Mayer, or any of its constituent companies?

A. Well, in 1910, I entered the industry in the employ of the General Film Company in the capacity of a clerk, and over a period of several years, I occupied the positions of traveling auditor, bookkeeper, salesman and branch manager. I later was associated with the Mutual Film Corporation as an assistant to a Vice President and traveling representative. I later was with the Triangle Film [fol. 4504] Corporation as a manager of its Pittsburgh, Pennsylvania, office and also a field representative, and for a very short period I was with the Hall Mark Company. I can't recall the dates, but I was a sales manager there. I left the Triangle to come back with the General Film Company and stayed there possibly a year or so as sales manager of the company, and later entered the employ of the Goldwyn Company about 1917 as an assistant to the Vice President and left them in 1918, and in 1920, for a very short period, I was with Paramount Pictures, as sales manager of short subjects, and entered the employ of the Goldwyn Company in 1920 again, and from that time on I have been either with the Metro-Goldwyn-Mayer or Loew's, Inc.

Q. And in what positions with the Loew's, Inc., or its constituent companies from the beginning of that connection which I think you said was 19——

A. The Goldwyn Company 1920, but we merged with the Metro Company in 1924.

Q. And the Mayer conjunction came in about the same time?

A. Approximately the same time, yes.

Q. Take it from 1924 down to date, what has been your connection, position, with Metro-Goldwyn-Mayer Company and with Loew's, Inc.?

A. Well, I was an assistant to the Western Sales Man- [fol. 4505] ager and assistant to the Eastern Sales Manager too, for a very short time after the merger, and then later was the Eastern Sales Manager, and I had that position for approximately 11 or 12 years until I was appointed General Sales Manager in 1936, and two or three years ago I was appointed a Vice President of the Company.

Q. Do you recall Mr. Charles E. Dickinson, Jr., one time interested in the operation of a theatre in Lockport?

A. Yes.

Q. Mr. Dickinson has testified to a conversation with you apparently in 1933. He gives the conversation at page 1962 in these terms, he, meaning yourself, "He told me he would like to have his pictures played in the Palace Theatre, that Metro-Goldwyn-Mayer always liked to have their pictures played in the best house in any town, the most outstanding house, but that a contract with the Palace Theatre for the 1933-1934 season in contrast with a contract for the Schine Chain would amount to peanuts, and he was sorry, but he could not do anything for us." Did you at any time say that last to Mr. Dickinson?

A. I did not.

Q. Give me to the best of your recollection the conversation that you had with him in the summer of 1933 in the terms "I said" and "He said," or "He said" and "I said." [fol. 4506] A. Well, Mr. Dickinson called upon me in New York—I can't recall the exact time—desiring to have our pictures for the following season, and I told him at that time very definitely that I didn't think that we would sell him. He then demanded the pictures, claimed he had a right to them. I told him at the time the only reason he played our pictures was for the reason we had a serious disagreement with the Schine outfit at the time and he was the only outlet in Lockport to play them at the time, and in having the disagreement with Schine, we preferred to go back to them in the next year, and he became very abusive and I thought, under those circumstances——

Mr. Wright: If the Court please, this calls for conversation.

The Court: If you recall what was said.

The Witness: He threatened me at that time with a lawsuit. He threatened me with various different things. He was very abusive in his conversation.

The Court: The word "abusive" is a conclusion of the mind. Confine yourself to the conversation in your testimony.

The Witness: He threatened me. I told him then we [fol. 4507] would not sell him. He told me his standing in the community, why we should sell it to him. I told him he had no rights whatever, and I told him then as far as I was concerned, we would not offer him any part of our product.

Q. Mr. Rodgers, have you been in the court room this morning during the entire testimony of Mr. Depinet?

A. Yes.

Q. Have you heard that testimony?

A. Yes.

Q. Was your attention arrested on any respects in which Metro-Goldwyn-Mayer policy of sale and dealing with theatres differed from that of R.K.O.?

A. Well, I might say somewhat slightly, yes. We set up our policy in maybe a little different fashion. We try to select, as Mr. Depinet outlined, the logical customer in a locality based upon many, many elements, try to deal with them as fair as we can. We have a basis of dealing which is in many, many places, automatic, according to the terms that the theatre finally pays us. We have a sliding scale of percentage, so to speak, where a fair percentage of our customers pay under such arrangements, where the gross receipts are fixed, he pays upon the gross receipts on the amount of business they do, or based on percentage in con- [fol. 4508] nection with the gross, but, generally speaking, I might say we try to conduct our business much along the same way Mr. Depinet outlined.

Q. Have you had any personal dealings with the Schine Circuit?

A. Well, not for many years.

Q. Have the negotiations with the Schine Circuit and the consequent contracts been reported to you from time to time for your approval or consideration?

A. Well, not necessarily for my approval, but for my consideration, and sometimes acquaintanceship with progress of developments or negotiations, but not for my approval. Our sales manager approves those contracts.

Q. Those sales managers being who, from time to time?

A. We have an eastern sales manager now, Mr. E. K. O'Shea, and we have a central sales manager, Mr. J. J. Maloney, and a western sales manager, Mr. J. E. Flynn, and what we call a circuit sales manager, Mr. E. W. Aaron, and I have an assistant general sales manager, E. M. Saunders.

Q. In that territorial division I take it that the Buffalo and Albany districts would fall in the eastern division?

A. Well, the Albany would, but Buffalo is in a central division, and it is just in the course of being transferred now back to the East.

Q. The central division would include Buffalo and Ohio [fol. 4509] and Kentucky and Maryland and the District of Columbia, among others?

A. Not the District of Columbia. That would be in the East. The others would be in the Central.

Q. Going back to 1931 to 1939, what was your division among sales managers for these respective districts? Do you remember who were over which district?

A. From 1931 to 1936 I was the Eastern Sales Manager, and I believe at that time we only had—yes, we had a Southern Sales Manager with just charge of the southern office up until 1936, and a Western Sales Manager, who had charge of everything from Chicago west.

Q. From the period 1931 to 1936, you were the Sales Manager that would cover the area, New York, Ohio, Kentucky, Maryland and the District of Columbia?

A. Yes, sir.

Q. Representatives of Loew's, Inc. want me to ask you, in substance, if Metro-Goldwyn-Mayer or Loew's, Inc., are the best distributors in the motion picture industry, with the finest pictures and regard themselves as tops in all respects, is that so?

A. It depends under what circumstances. Sometimes we admit it and other times we don't.

Q. Well, if you at this time think of any respect in which any other distributor is in any more prominent position, or

[fol. 4510] has any better pictures, in general, will you state it now?

A. Well, I don't believe anybody has as good, not any better pictures, and, as far as distribution is concerned, we think that we are fairly good.

Q. Mr. Rodgers, I confine this question, which I am about to put to you to your personal knowledge, not what you have been told by anybody else. To your knowledge, has there been any conversation with any of the defendants, or their executives, or employees, not to deal with any competing exhibitor or to restrict the terms of such exhibitor?

A. No.

Mr. Wright: Same objection.

The Court: I will receive it.

Cross-examination.

By Mr. Wright:

Q. Mr. Rodgers, when you had this conversation with Mr. Dickinson in the summer of 1933, you say, you referred to some disagreement you had with the Schine Circuit?

A. Yes.

Q. You are referring to that by the fact you had been out of the circuit for the 1932-33 season?

A. We had been out for some time. I don't know whether [fol. 4511] it was the 1932-33 season, but it was immediately preceding that time.

Q. This conversation you had was about the 1933-34 season?

A. I don't recall how long we were out of them. I don't recall at the time.

Q. The disagreement you are referring to?

A. Was the preceding year.

Q. Was after you had been out of the circuit for the preceding year?

A. Yes.

The Court: What do you mean by "disagreement"?

The Witness: Mr. Schine had a representative that came to New York to negotiate with me, and he did negotiate a deal, and when he returned he returned to his headquarters, they had some disagreement there which resulted in a disagreement with me, so he didn't do any business.

Mr. Wright: Would you read to me the last question and answer of Mr. McClennen's?

(Reporter then read last question of Mr. McClennen's on direct-examination, on page 4510, lines 6 to 12, inclusive.)

The Court: Was the question in a different form than it was before, Mr. McClennen?

[fol. 4512] Mr. McClennen: Your Honor please?

The Court: I thought the form of your question might be a little different.

Mr. McClennen: That question was read from the one put before.

The Court: I had reference to the word "statement" in there, something about a statement made, I don't know.

Mr. McClennen: Well, the question put to Mr. Andrew Smith and to Mr. Depinet, and as I intended to phrase it to Mr. Rodgers was: I confine this question, which I am about to put to you, to your personal knowledge, not what you have been told by anybody else. To your knowledge has there been any conversation——

The Court: What was that?

Mr. McClennen (Continuing): —to your knowledge has there been any conversation with any of the defendants, or their executives, or employees, not to deal with any competing exhibitor or to restrict the terms of such dealings?

The Court: It was the same as before.

[fol. 4513] The Court: Mr. Wright was cross-examining.

Mr. Wright: If the Court please, there is something that has come up here that I would appreciate a short recess to look over before we excuse Mr. Rodgers.

Mr. McClennen: There are one or two questions I will put, if I may.

The Court: All right.

By Mr. McClennen:

Q. In the period 1931 to 1936 was the approval or disapproval of contracts proferred from the Eastern Division in your hands?

A. Yes, sir.

(Short recess taken.)

Mr. Wright: If the Court please, I have concluded my examination. I wanted to offer while Mr. Rodgers was on

the stand letters which were previously identified. The first one, 441 for identification, is a letter dated February 7, 1936, addressed to Mr. Lynch. It just has the initials at the bottom, "W.F.R."

By Mr. Wright:

Q. Those are your initials, are they?

[fol. 4514] A. I do not see my initials. I just see dictated initials, but I can't see mine on here. I assume that it is, however.

Q. That is a letter that you wrote?

A. Yes, sir.

Mr. McClennen: Those that you showed you need not bother with.

Mr. Wright: It did not have the name on it.

Mr. McClennen: What exhibit is that?

Mr. Wright: That is 441.

Mr. McClennen: What is it?

Mr. Wright: That is a letter dated February 7, 1936, from Mr. Rodgers to Mr. Lynch. We offer this Exhibit 441 and Exhibit 424 for identification, which is a letter from Mr. O'Shea to Mr. Rodgers, dated October 13, 1933. An Exhibit 491 for identification, which is a letter or a memorandum from Mr. Rodgers to Mr. Conners, dated June 8, 1939, and Exhibit 509 for identification, which is a memorandum from Mr. Aaron to Mr. Rodgers, dated August 2, 1938, and Exhibit No. 510 for identification, which is a memorandum, dated July 29, 1938, from Mr. Rodgers to Mr. Conners.

[fol. 4515] (Thereupon the letter, dated February 7, 1936, Rodgers to Lynch, previously marked as Plaintiff's Exhibit 441 for identification was received in evidence.)

(Thereupon the letter, dated October 13, 1933, O'Shea to Rodgers, previously marked as Plaintiff's Exhibit 424 for identification was received in evidence.)

(Thereupon the memorandum, dated June 8, 1939, Rodgers to Conners, previously marked as Plaintiff's Exhibit 491 for identification was received in evidence.)

(Thereupon the memorandum, dated August 2, 1939, Aaron to Rodgers, previously marked as Plaintiff's Exhibit 509 for identification was received in evidence.)

(Thereupon the memorandum, dated July 29, 1938, Rodgers to Conners, previously marked for identification as Plaintiff's Exhibit 510 was received in evidence.)

The Court: Does that conclude your examination?

Mr. Wright: Yes.

Mr. McClennen: That is all.

The Court: We will take a recess until 2 o'clock P.M.

(Whereupon a recess was taken until 2 o'clock P.M.)

[fol. 4516] After Recess, 2 P.M.

Appearances: Same as before noted.

Edwin J. Smith, a witness called by and on behalf of the Defendants and having been first duly sworn was examined and testified as follows:

Direct examination.

By Mr. McClennen:

Q. What is your residence?

A. Buffalo, New York.

Q. In September, 1941, what was your employment and with what company?

A. Salesman for RKO-Radio, Inc.

Q. Did your territory include Syracuse?

A. Yes.

Q. It has appeared that on September 9, 1941, Mr. Wallace telegraphed—I haven't the words before me—in substance that he wanted to talk about pictures for the Strand Theatre in Syracuse. Did that telegram come to your attention?

A. I can remember that Mr. Lux asked me to contact this exhibitor in Syracuse.

The Court: Speak up louder.

A. Mr. Lux, the Buffalo Manager, asked me to contact [fol. 4517] that theatre in Syracuse. Whether it was on the 13th or a few days afterwards, I don't recall.

Q. So that the first you had was some word from Mr. Lux that you were to see Mr. Wallace?

A. That is right.

Mr. McClennen: Mark this for identification.

(Thereupon the expense account referred to was marked as Defendants' Exhibit D-172 for identification.)

Q. I show you Defendants' Exhibit 172 for identification. What is that paper?

A. That is my weekly expense account for traveling.

Q. Did you at some time, in Mr. Wallace's office or the Strand Theatre office in Syracuse, telephone to Mr. Lux at the Warner Theatre Company's office in Albany?

A. I talked on the telephone with Mr. Lux and I don't know—it was either Albany or Buffalo.

Q. Against this date on Exhibit for identification D-172 I call your attention to the item "Tuesday, September 16, 1941, L.D. 'phone service charge 30 cents." Can you recall what that was for?

A. Well, it was to try to contact Mr. Lux. Whether I called him at Albany or Buffalo I do not know.

Q. Did you telephone Mr. Lux more than once about that time concerning the Strand Theatre possibilities?

[fol.4518] A. That is hard to remember, but I usually contacted him once or twice a week on various matters and I can't recall any specific call there.

Q. It has appeared from Mr. Lux's testimony that he was in Albany on September 15 and 16, 1941. Now, with that fact before you, can you recall whether it was to Albany at that time that you telephoned him?

A. That clears it up. It must have been Albany that I talked to him on that day.

[fol. 4519] Q. Up to that date or the day before September 15, 1941, do you recall having seen Mr. Wallace after September 9th, 1941?

A. I have a faint recollection I talked to him between the 14th and including the 16th. I mean in the previous week.

Q. The 14th would be Sunday. Do you mean by that that you had talked with Mr. Wallace before Sunday, September 14th, 1941?

A. I talked to him sometime. I don't know whether it was a personal conversation or a telephone call.

Q. And that was at sometime after you had learned that you were to see Mr. Wallace from Mr. Lux after his telegram of September 9th?

A. Yes, that is right.

Q. If there was a telephone call in that period, have you any recollection of what was said in that conversation with Mr. Wallace?

A. The only thing that I recall saying that I had word from Mr. Lux to contact him and that I had product available for him, for his theatre.

Q. Did you describe the product or name the product?

A. No, not over the phone.

Q. Did you at that time over the phone arrange when you would see him?

[fol. 4520] A. I don't recall, but naturally I must have made an appointment for the 15th or 16th.

Q. On the 15th or 16th of September, 1941, you had conversation with him at the Strand Theatre office in Syracuse?

A. Yes.

Q. And that was the first personal conversation you had with him on this Strand subject?

A. If I recall—I mean, it is so long ago my memory is not clear on it.

Q. Relate the conversation that you had with Mr. Wallace on that occasion, be it September 15th, 1941 or September 16th, 1941, and keep away from any conclusions. State "He said" and "I said," just as nearly as you can reproduce that conversation.

A. Well, as I recall Mr. Wallace said he was in need of product for the Strand Theatre and my reply was that I had a number of pictures which I listed for his purchase.

Q. How did you list them?

A. According to price and age and classification, and so forth.

Q. When you listed you mean that you scratched them down on paper?

A. I imagine so, yes.

Q. I show you Plaintiffs' Exhibit 980 in two sheets. Are [fol. 4521] those in your handwriting?

A. The first sheet is not in my handwriting, the top sheet.

Q. And how about the second sheet?

A. The second sheet is in my handwriting except the figures below which are not mine, on the bottom part, and this figure.

Q. That is these seven picture names are in your handwriting?

A. Yes.

Q. Is this below the line, "Snowwhite" also in your handwriting?

A. Yes.

Q. Can you recall what you told Mr. Wallace about those five pictures under the heading "First-run" and three pictures under the heading "Second-run", using that paper to refresh your recollection as far as it will?

A. As I recall I told Mr. Wallace I had a number of pictures, some first-run and some second-run, but the two films listed as first-run "They Meet Again" and "Hurry, Charlie, Hurry" were under contract to another theatre and, if they were released, I could negotiate with those. The others were available.

Q. And when you say "released", you don't mean in the sense released for exhibition, but released from the prior contract?

A. Released from under contract to another party,

[fol.4522] Q. The other party in this instance was RKO——

A. RKO Schine Theatres.

Q. What were the release dates of the pictures as you set them down on that memorandum?

A. I notice that the year is missing, but as I recall the release dates were in rotation as of June 6, 1941, July 11, 1941, July 25, 1941, and September 28, 1941.

Q. "Saint's Vacation" being June 6th; "They Meet Again", July 11th, and "Hurry, Charlie, Hurry", July 25th, and "Jungle Cavalcade", September 28—that is 9-28?

A. Yes, sir.

Q. I call your attention that on the RKO release schedule, Exhibit 634, at page 3867, it appears that "Jungle Cavalcade" was released for exhibition June 27, 1941. This date, July 28, 1941, is the availability date under your heading "Second-run", is it not?

A. Well, I think that this date here referred to a subsequent run. That is beyond the second run.

Q. Beyond the second-run?

A. Yes, sir.

Q. So that September 28th was the date when that picture coming out in June, 1941, would be actually available for Mr. Wallace, if he took that picture?

A. I think that is correct.

Q. At that interview of September 15 or 16, 1941, did you [fol. 4523] make out these five sheets that are Plaintiff's Exhibit 819?

A. Yes.

The Court: Did you say the 15th?

The Witness: 15th or 16th. I think it was concluded on the 16th, this application copy.

By Mr. McClennen:

Q. And these were the copies left with Mr. Wallace or Mr. Carr by you?

A. Yes, sir.

Q. Did you have some talk with Mr. Wallace at that time on either one of those two days as the pictures available for his opening proposed for September 20, 1941?

A. Yes.

Q. Is this Exhibit D-168 for identification in your handwriting?

A. Yes, and the dates set opposite it were tentative dates subject to the approval of the office and the availability of prints.

Q. That is, you told him that "Jungle Cavalcade" would be available for September 20th to 23rd and "Flying Down to Rio" also?

A. I didn't say available. I said subject to the prints being available, and the dates were tentative.

Q. Now, it appears against "Flying Down to Rio" that [fol. 4524] over at the right-hand side of the paper are the words "Sept. 20-23." Are those in your handwriting?

A. Yes.

Q. And what is the significance of those dates over there?

A. The same reason. They are tentative dates.

Mr. Wright: Just a minute. I suppose we ought to have here what he actually said about the dates at the time and then your Honor can judge what the significance of them was.

The Court: Let him state what was said about them.

Q. What did you say to Mr. Wallace about the availability of "Flying Down to Rio"?

A. Well, I would say the same thing to Mr. Wallace that I would say to any of my——

Q. No. What you did say to him.

A. I said I would take the dates subject to the approval of the office.

The Court: That is for showing from the 20th to the 23rd, you mean?

The Witness: Yes, sir. And that applies to all dates.

By Mr. McClennen:

Q. Was there anything said in that conference on either September 15 or September 16, 1941, as to finding out from the office whether that picture "Jungle Cavalcade" or any others would be available?

[fol. 4525] A. I recall a telephone conversation with Mr. Lux at Albany.

Q. What did you say over the telephone to Mr. Lux in Mr. Wallace's presence?

A. Well, I asked Mr. Lux if he thought these dates would be available, that Mr. Wallace wanted these pictures on the dates submitted, and he said that he had no record of it there, but he would have to take it up with the Buffalo office.

Q. In that telephone conversation did you say anything with reference to the availability of "Hurry, Charlie, Hurry" and "They Meet Again"?

A. I could not give him anything definite on that because the pictures were under contract to another party.

Mr. Wright: I move to strike that as not responsive.

The Court: What did you say to him about the pictures?

Q. In Mr. Wallace's presence did you hear anything said about those two pictures?

A. Well, naturally, they were part of——

Q. No. If you don't remember, say so. If you do remember, say so.

A. I don't recall.

[fol. 4526] Q. Did you take away counter parts of these five applications, Exhibit 819?

A. Yes.

Q. And what did you do with them?

A. I mailed them to the Buffalo office for this procedure and approval.

Q. Do you remember whether you had any further conversation with Mr. Wallace, either September 15th or 16th, 1941, or thereafter with reference to "Hurry, Charlie, Hurry" and "They Meet Again"?

A. Well, I had a number of conferences with Mr. Wallace, after that, but I cannot remember the dates specifically pertaining to those two pictures.

Q. Can you remember anything that you said about those two pictures to him?

A. As I stated previously I told him that the pictures were not in the clear at the present time, and if they were

open for sale I would be glad to negotiate for him and get the playing time.

Q. At any time thereafter do you remember whether you told him that they were cleared on the earlier contract or were not cleared on the earlier contract?

A. Not that I can recall.

Mr. McClennen: That is all.

[fol. 4527] Cross-examination.

By Mr. Wright:

Q. This second sheet of Plaintiff's Exhibit 980 that I believe you said was in your handwriting, are there any parts of that that aren't in your handwriting?

A. This is not my handwriting.

Q. When you say "this" you are referring to the figure 1,000 with a circle around it?

A. 1,000.

Q. Any others?

A. I am not sure of that.

Q. When you say "that" you are referring to 25 cents?

A. 25 cents. Sixty-two fifty don't look like my figures and these are not my figures.

Q. When you say "these" you refer to 350-157-50?

A. 350-157-50.

The Court: How about the drawing? What does that mean?

The Witness: I don't know. It has no bearing, your Honor.

Mr. Wright:

Q. Are there any other figures or words on there that aren't in your handwriting?

A. The writing of "Tim Holt" after "Six Gun Gold" is not my writing.

[fol. 4528] Q. That isn't yours?

A. No.

Q. Is there anything else?

A. That doesn't look like my writing, the word "now" after "They Met in Argentina."

Q. The word "now" do you say it is or is not yours?

A. It doesn't look like mine.

Q. Do you know?

A. I am not positive.

Q. You don't know whether you wrote it or not?

A. I am sure it is not mine.

Q. The word "now" after "Argentina" you say is not yours?

A. No.

Q. How about the figures 100?

A. That is not mine.

Q. But you say the word "now" is yours?

A. Yes.

Q. How about the word after the title "Reluctant Dragon," you think now that is yours?

A. That looks like it.

Q. And the 200 after that?

A. No, that is not mine. I make a different "2" usually than that. That is mine. I am sure of that.

Q. You think it is yours?

A. Yes, I am sure.

[fol. 4529] Q. And then this "Jungle Cavalcade," "X O.K.," that is yours, is it?

A. I can't tell whether next is mine or somebody's else's, but it looks like mine. It is written at the same time with the same lead pencil. You see that is lighter lead.

Q. This 9-28?

A. That is my figures, yes, sir.

Q. As I understood your testimony on direct-examination, these dates you wrote in here opposite "Saint's Vacation," and "They Meet Again" and "Hurry, Charlie, Hurry," were the dates on which those pictures were generally released, is that right?

A. Generally released or available for second or subsequent-runs.

Q. Well, which?

A. Both.

Q. Well, the pictures on the dates that they were generally released, that would be the date on which they became available to the first-runs, isn't that right?

A. That is right. That refers to the upper three pictures.

Q. So that these dates July 6th, July 11 and July 25——

Mr. McClennen: Through June 6th.

Mr. Wright: Through June 6th. I beg your pardon.

Q. Those are all the dates on which those pictures became available for exhibition first-run in Syracuse, is that right?

[fol. 4530] A. As I recall now.

Q. Then you say this "Jungle Cavalcade" date you wrote in there was the date on which that picture became available for second-run?

A. I think that was the subsequent-run picture.

Q. What about the date? Was that 9-28- the date on which it became available for second or subsequent-run?

A. Well, I don't recall now, but I should say it was the subsequent-run, because it had a prior run, as I recall it, at the Cameo Theatre, which is the third-run in the city.

Q. I thought you said before it was the date on which it became available—it would be available to Wallace at the Strand?

A .Well, that would apply as a subsequent run.

Q. As I understand it, this Exhibit D-168, that is entirely written by you, is that right?

A. That is right.

Q. And when and where was that written?

A. I imagine that this was written in the office of the Strand Theatre.

Q. When you say "this" you are referring to your D-168?

A. Yes.

Q. At the time you had your talk with Mr. Wallace?

[fol. 4531] A. Yes.

Q. And during the time you were also talking with Mr. Lux?

A. I don't remember whether these dates were laid down and this sheet was written before or after I talked to Mr. Lux, this particular sheet.

Q. When you say "this" you are referring to you- D-168?

A. That is right.

Q. You don't remember whether you wrote what is on there before or after you talked to Lux?

A. I don't.

Q. Might have written some of it before and some after?

A. No, it was all written at one time.

Q. All written at once?

A. Yes.

Q. But you don't recall whether it was before or after you talked to Lux?

A. No.

Q. These dates that you wrote on Exhibit D-168, that first one "Jungle" and "Flying Down to Rio" for September 20 to 23, that was the date on which they were to be exhibited at the Strand?

A. No, that is the dates that were requested by Mr. Wallace. He did a lot of juggling trying to work out a program and submitted dates on double-feature policies.

Q. Those were the dates that Wallace wanted the pictures [fol. 4532] for the Strand, the 20th to 23rd on those two pictures?

A. That is right.

Q. They were to be followed on the 24th to 26th, "They Met in Argentina" and "Hurry, Charlie, Hurry"?

A. Providing the pictures were in the clear.

Q. Well, those were the dates you discussed those dates with Wallace at the time?

A. Those were the tentative dates they were taken.

Q. And then the dates here September 27th to 30th that you have opposite "Reluctant Dragon" and "They Meet Again" are the dates for—he was going to play or he wanted to play those pictures at the Strand, isn't that right?

A. Yes.

Q. What is this figure after the date on "Tom, Dick and Harry," on here?

A. I don't know. It looks like "On" and again it looks like "O. K."

Q. Which is it?

A. I can't tell you.

Q. Look at it carefully?

A. I can't tell you.

Q. If you wrote "On" what would that mean?

A. I don't know.

Q. You don't know how you happened to write that?

A. No, I don't. It is so far back I don't recall it. It [fol. 4533] looks like an "O.K." I don't write "O.K." that way, that's all.

Q. Is that in your handwriting or somebody else's?

A. That is very difficult——

Q. What?

A. That is very difficult for me to tell you. I imagine it is in my handwriting.

Q. You wrote up the sheet. Nobody else wrote on it?

A. There is other figures. This figure here, for instance, the rest of the sheet is all mine.

Q. You can tell from looking at this you wrote "Tom, Dick and Harry," October 16-17," can't you?

A. It looks like "O.K." to me.

Q. That is what you wrote, isn't it?

A. I don't write a "k" like that. I mean—let's see here. I don't write a "k" like that. I can't give it to you definitely whether that is my writing or not.

[fol. 4534] Q. You don't know whether you wrote it or not?

A. No.

Q. Who do you think wrote it, if you didn't?

A. I wouldn't know because there are many figures on these other sheets that are not mine. It might have been written before or afterwards.

Q. Give me any other figures you see on this Exhibit 168 which you think you didn't write.

A. I didn't write that (indicating).

Q. When you say "that" you are referring to "B" in parenthesis?

A. Yes, sir. All those down this side here (indicating) do not look like my handwriting, 1, 2, 3, 4, 5, 6 of them.

Q. All of these notations in the column headed "Second Choice" there you say you didn't write?

A. That is right.

Q. Who wrote those?

A. I don't know.

Q. Well, what did you do with the paper after you wrote it?

A. I sent it in to the Buffalo office.

Q. You don't know who worked on it there?

A. I do not.

Q. You know that the figures you have just referred to were either put on by you or somebody at your Buffalo [fol. 4535] office; is that right?

A. I know that I didn't put them on; that is all.

Q. Just answer my question. Don't you know that you put them on or somebody at your Buffalo office put them on?

A. No, I don't.

Q. Who else could have put them on?

A. I don't know. I know I didn't put them on.

Q. Who else do you think could have put them on other than as I have suggested?

A. I have no idea what happened to the paper after it reached the Buffalo office.

Q. I say, do you know that either you wrote those figures there or they were written by somebody after it got to the Buffalo office?

A. Right. That is different.

Q. Now, as I understand it, you said that these pictures, "They Meet Again" and "Hurry, Charlie, Hurry" were under some contract to the RKO-Schine Theatres there?

A. Yes, sir.

Q. Have you got a copy of that contract?

A. No, I haven't. I have never seen it.

Q. And those dates you wrote down there on this Exhibit 980 were the dates on which they became available for first-run exhibition under that Schine-RKO contract; is that right?

[fol. 4536] A. I believe that is right.

Q. And then do you know what the custom was as to how much of an interval of time ordinarily elapsed after the picture became available before those theatres would tell you whether or not they wanted to use the picture?

A. That is impossible to tell. It varies in many situations and it varies according to the class of picture. It may be held off for two weeks, three weeks, or six months.

Q. For six months or a year?

A. If they can't find the right booking spot for it that is possible.

Q. That is, even if they don't book it, you do not try to sell it to any one else?

A. Not unless it is in the clear.

Q. When does it become in the clear?

A. That is beyond me. That was not any of my duties.

Q. You didn't know anything about that?

A. No.

Q. You didn't make any effort to determine whether any of these pictures that you wrote down on this sheet 980 were then available for Mr. Wallace's Strand Theatre; is that right?

A. Oh, yes, I do. I knew that these other pictures aside from the first-run pictures were available.

Q. When you say "aside from the first-run pictures" you [fol. 4537] mean aside from "Saint's Vacation", "They Meet Again", "Hurry, Charlie, Hurry", "Flying Down to Rio", and the others?

A. "Six Gun Gold", "They Met in Argentina", "Reluctant Dragon", "Jungle Cavalcade" and "Snow White".

Q. You say all of those were not then available; is that right?

A. No, I said, as I recall, they were all available for tentative booking, tentative play dates, but the three in the first-run situation.

Q. That is, the three that were not available were "Saint's Vacation", "They Meet Again" and "Hurry, Charlie, Hurry"?

A. As far as I knew at that time.

Q. How did you happen to write those dates down opposite those names; do you remember?

A. That I don't recall. It is hazy to me.

Q. You don't know why you wrote those down?

A. No, I don't.

Q. You say you wrote down the dates that are on this Exhibit D-168 simply because those were the dates that Wallace told you he wanted those pictures for the Strand Theatre; is that right?

A. No, those were the dates that were requested.

Q. When was it you prepared these contract applications that have been marked here in evidence as 819, with [fol. 4538] reference to the time that you made up these sheets marked D-168 and 980?

A. These applications for contracts were written up on the 16th.

Q. That was after you had prepared this memoranda D-168 and 980?

A. The contracts were written first, as I recall it.

Q. Which is right?

A. I recall the contract application was written first. Whether this was written on the same day or the next day, I am not positive.

Q. The first thing you did before you had any discussion of dates you wrote up these applications; is that right?

A. Yes, sir.

Q. Then you discussed with Mr. Wallace the dates on which the pictures mentioned in these contracts marked 819 would become available for his theatre, did you not?

A. In answer to that, I don't recall whether all these dates were discussed on that very day after the application copy was taken, whether there was part of them discussed

that day and part of them the next day, and then mailed to the Buffalo office.

Q. How about the next?

A. I am not positive.

Q. But it was after you took the applications?

[fol. 4539] A. Yes.

Q. Then you discussed the dates for the pictures?

A. That is right.

Q. Did you make any inquiry with respect to availability of those pictures and the prints and when you would have prints for Mr. Wallace on them?

A. I don't recall. I know that was part of the discussion with Mr. Lux at the time I talked to him.

Q. As to when these prints would be available; is that right?

A. Yes.

Q. Now, then, you remember when these lines were drawn through "They Meet Again" and "They Met in Argentina"?

A. No, I do not.

Q. Did you draw the lines?

A. Not that I know of.

Q. That was done by somebody at the RKO branch?

A. I don't know. I didn't do it now as I recall. I wouldn't draw any lines. I wouldn't see any purpose of drawing any line.

Q. The last time you had anything to do with this D-168 the lines that are drawn through those titles were not on there; is that right?

A. I imagine so.

Q. As I understand it, you had this conversation with Mr. Wallace about these dates and you took the contracts, [fol. 4540] or sent the contracts in, to the Buffalo office, and you also had these calls about the availability of the pictures and the prints, and then you never told Mr. Wallace when the pictures would be available and if they were available; isn't that right?

A. Well, I don't recall clearly, but it is only natural that I would tell them that some of the pictures were not in the clear, that they were still under contract and the dates taken were tentative and could not be approved.

Mr. Wright: See if you can answer the question. Read it again.

(Last question read.)

A. Yes, I did.

Q. You did? When did you tell him that?

A. I can't recall. I can't remember when it was, whether it was the week following or the second week following.

Q. Was this over the telephone or in person?

A. It was in person as I remember.

Q. You made another call?

A. I made a number of calls there after that.

Q. I mean with reference to these pictures that are on the contract applications here identified as 819.

A. Well, I should say I called on him at least twice in the following week.

[fol. 4541] Q. By the following week you mean what week, the week of the 23rd?

A. No, the week of the 16th and the following week.

Q. As I understand it, you saw him on the 15th and 16th?

A. That is right.

Q. First you took these contract applications—you think that was on the 15th——

A. No, that was on the 16th.

Q. You think this was on the 16th that you took the contract application?

A. That is right.

Q. And then after that on the 16th you prepared this Exhibit D-168 and you wrote these figures on Exhibit 980; is that right?

A. Which is 980, that first one?

Q. This page here, this second page of Exhibit 980 (indicating).

Mr. McClennen: Which pictures are you indicating?

Mr. Wright: Whatever he wrote on that page.

A. These figures here were written up before the application contracts were taken.

Q. This was the first thing you wrote when you talked to Mr. Wallace on the 15th; is that right?

A. That is right. That is the work sheet.

Q. This is what you wrote up on the 15th?

[fol. 4542] A. Yes, 15th or 16th. I don't recall.

Q. This was the first written document you prepared was this 980; is that right?

A. Yes.

Q. And you think that was on the 15th or the 16th?

A. That is right.

Q. Then the next thing you wrote out were these applications, Exhibit 819, is that right?

A. That is right.

Q. And that was either on the 15th or 16th?

A. I am sure that that was on the 16th.

Q. That was on the 16th?

A. Yes, sir.

Q. And then after you wrote up the application then you prepared this Exhibit D-168; is that right?

A. That is right.

Q. You sent that along to the office at Buffalo with——

A. I don't know whether this was written on the 16th or the following day or so.

Q. That might have been the 17th?

A. That is possible.

Q. You didn't send it in to Buffalo at the same time that you sent in 819?

A. Not that I recall. There is nothing to guide me there.

Q. And then when was the next time after you had sent [fol. 4543] this D-168 in to Buffalo that you saw Mr. Wallace?

A. I don't remember. I saw him a number of times from then on, possibly twice a week from then on.

Q. Do you remember when it was that you gave him definite information about what dates he could have and what dates he couldn't have?

A. No, I don't recall, because ordinarily or usually that confirmation comes direct from the Buffalo office.

Q. You don't recall, then, any time that you talked to him about a date for any of these pictures that are listed here on D-168 after that was prepared?

A. No, it is so long ago that I don't remember.

Q. You don't know whether you ever confirmed a date to him or not on any of them?

A. No, sir, I do not. That is not in my power to do that.

Mr. Wright: See if you can answer the question. I move to strike out what is not in his power.

A. No.

Q. You never did that?

A. Not that I recall.

Q. You know, do you not, that some of these pictures were supplied and played on the dates that are noted there; isn't that right?

A. That is right.

Q. On 168?

[fol. 4544] A. Yes, sir.

Q. And as to "They Meet Again", do you remember what finally happened to that?

A. No, I remember that the picture was not released from the RKO-Schine contract.

Q. When you say it was not released, did you have anything to do with releasing it or getting it released?

A. No, nothing whatever.

Q. Do you know when it was released?

A. No, I do not.

Q. Or what was done in that connection?

A. No, I do not.

Mr. Wright: I move to strike out his answer then as to knowing that it was not released.

The Court: Granted. You mean that you do not know the time when it was released? You know of its being shown?

The Witness: Yes, I understood it was to be shown.

The Court: Not what you understood. Do you know yourself that it was shown?

The Witness: I can't recall, but I assume it was shown.

Mr. Wright: I was going to ask him about the actual exhibition.

By Mr. Wright:

Q. The picture played the Eckel Theatre there in Syra-
[fol. 4545] cuse at about the same time, or around September 25th, didn't it?

A. I don't know that.

Q. You don't remember that?

A. No, sir.

Q. Can you remember that it was substituted there on the second half of a double-bill for a double-bill that had been moved over from the Keith or Paramount?

A. No, I would have no way of knowing that.

Q. You know nothing about that?
A. No, I have nothing to do with those houses.

Mr. Wright: That is all.

Redirect examination.

By Mr. McClennen:

Q. Were you aware at the time of the fact of the playing of "They Meet Again" at the Eckel Theatre beginning September 25, 1941?
A. No, I was not.
Q. Were you aware of the fact of the playing of "Hurry, Charlie, Hurry" at the Eckel Theatre, October 30 to November 5, 1941?
A. No.
Q. Were you aware of the sending of this telegram, Plaintiff's Exhibit 820, dated September 18, 1941, to the Strand [fol. 4546] Theatre, saying "Impossible supply 'Jerry Charlie' September 24-26" or "'They Meet Again' 27-30", or, as the office copy, Plaintiff's Exhibit 831, reads "Impossible supply 'Hurry, Charlie' September 24-26" or "'They Meet Again' 27-30"; were you aware of the sending of those?
A. I don't recall seeing those.
[fol. 4547] Q. Do you bear in mind whether you were aware that just after you sent in those applications, Exhibit 819, the Strand Theatre was notified that they couldn't have those two pictures as I have stated?
A. Yes.

Mr. McClennen: That is all.

Elmer Lux recalled by and on behalf of the Defendants, having been previously sworn, was examined and testified further as follows:

Mr. McClennen: If your Honor please, Mr. Lux was under cross-examination at the end of Friday, and Mr. Wright had expressed a desire to have Mr. Smith's testimony before he completed the examination, and, therefore, I put Mr. Smith on first. Mr. Lux is ready for further cross-examination.

Cross-examination (continued).

By Mr. Wright:

Q. Mr. Lux, you remember when we adjourned, I asked you to see whether you could find any copies of this Exhibit 819, and you were going to make a search and let us know [fol. 4548] the results. Did you make such a search?

A. I looked for them and couldn't find the exact copies of them, but I believe, as I mentioned to you, three of these pictures appear in our detail and clerical records as having been played as per the detail of this contract. The other two, as you know about and as I previously mentioned, they were not even considered, but Wallace was so advised.

Q. You couldn't find a copy of any of these contracts that are identified here as Exhibit 819, is that right?

A. No, but I probably could get three out of the New York office, and the other three they wouldn't have.

Q. Will you see if you can get them?

A. Yes.

Q. As I understood your previous testimony you would keep five of those copies at the branch office, is that right?

A. No, I did not testify to that. We keep one copy here and the other copies go to the office in New York. It is made in five copies. Our records show we played three of these pictures to conform with that setup.

Q. You haven't been able to find the copies?

A. No, but it is reasonable to assume that they exist and these are facsimiles or exact copies of them.

Q. As I recall your testimony then, the other day you [fol. 4549] weren't able to fix the time as the 15th or 16th on which you talked to Mr. Smith and Mr. Wallace about the pictures for the Strand Theatre?

A. That is right. I said it was probably late on the afternoon of the 15th or some time on the day of the 16th prior to my departure for Buffalo.

Q. Now that you heard Mr. Smith's testimony is your recollection helped at all as to which day it was?

A. No. I talked to him and it was on either one of those two days.

Q. You still don't know which one?

A. No, I couldn't testify to the exact day, sir.

Q. This telegram I believe you said was sent out by you, the telegram, which has been identified as Exhibit 831?

A. Sent out from my branch, and it is possible I may have dictated it.

Q. You don't remember whether you——

A. I am reasonably certain I did in this instance, because I gave it my personal attention as the result of having been called on it, I remember vaguely.

Mr. Wright: I think that is all.

The Court: That is all.

Mr. McClennen: That is all, Mr. Lux.

[fol. 4550] Herman Wobber, a witness called by and on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. McClennen:

Q. Your residence?

A. San Francisco,

Q. California?

A. California.

Q. Your present position?

A. I am the Division Manager, 20th Century-Fox.

Q. Of what?

A. Of the 11 western states in charge of sales.

Q. Will you describe briefly from the beginning your relations to the motion picture distribution business, the dates, as far as you can quickly fix them and the concerns with which you were from the beginning?

A. I have been in the distribution of motion pictures about 33 years, 21 years, with Paramount and the last 11 or 12 years with Fox. I was a Division Manager for Paramount about 20 years in the same territory that I have now for Fox. The 11 western states. I was Division Manager for Fox for about five years, and then became General Sales [fol. 4551] Manager of Fox for three and a half years from mid 1928 until the end of '41, since which time I have returned to the Coast as Division Manager.

Q. What was the period as exactly as you can fix it before becoming General Sales Manager for Fox that you were Division Manager, and what was the division?

A. The division was the 11 western states. I think it was from January, 1933 until the middle of June, 1938, end of June, '38.

Q. Who was your immediate predecessor as General Sales Manager for Fox?

A. John D. Clark.

Q. And when did he die? I don't care for the exact date?

A. May, '38.

Q. How long then had John D. Clark been the General Sales Manager for Fox?

A. I think five and a half years.

Q. Do you remember who was the General Sales Manager next prior to John D. Clark?

A. James Granger.

Q. You have been familiar, then, with the general sales policy from either the general or division managers' standpoint of Fox since what time?

A. Since 1933.

Q. You then were familiar with the general sales policy of [fol. 4552] Paramount for what period?

A. 21 years prior to that time.

Q. I think it has appeared that Mr. Kent went from either General Manager or General Sales Manager of Paramount to Fox. Do you have in mind approximately the date?

A. I think he moved over either in the latter part of '31 or early part of '32.

Q. And Mr. Kent is now dead?

A. Yes, sir.

Q. During the period from 1933 to May 19, 1942—and I do not mean by that question to intimate there was any change at that time, but that is a limiting date that has been adopted in this case—during that period 1933 to May 19, 1942, were you familiar with the sales policies of Fox determining their choice of the theatres that should be their customers in any particular place or locality?

A. Yes.

Q. Take the period from 1933 to 1938, will you relate the policy of Fox with reference to selling second-runs in smaller towns in opposition to their first-run customer?

Mr. Wright: If the Court please, I think that the best evidence as to what was done would be the contracts that were made. I don't think this witness is in a position to [fol. 4553] give information of the kind that he has been

asked to give here, except in terms so general they wouldn't have any relevancy to the issues we are trying.

Mr. McClennen: If your Honor please, it is obviously not possible to put before you all the contracts made during the period of five years with from ten to fifteen or sixteen thousand different theatres in the United States. It is important to show to you the relation of what was done in the particular case on trial before you in conformity or out of conformity with the general prevailing policy of the company. Now, the only way in which to show that general policy is by one experienced with that policy, and this man in the period that I have spoken of is the living man, the only living man, best fitted to describe that policy. That is the reason I put the question.

The Court: Well, it is the same question that was answered before, isn't it?

Mr. Wright: The other questions as I got them, I didn't understand them to be quite as broad and sweeping as this. [fol. 4554] This is nation wide without reference to what was done in this territory.

The Court: I think you can avoid any question by reframing your question to ask him what he does as Division Manager in these types, or instances in sales.

Q. Mr. Wooper, what is the course in determining the question of sales of second-runs in small towns in the period 1933 to 1938 to opposition to your first-run account?

A. We have always felt that it was most desirable to have the first and the second-run in the same ownership, expecting from the first-run the maximum amount of [illegible]ing maximum amount of advertising so that if the first-run didn't fully benefit that benefit would accrue to the second-run. Where there is competition we found frequently that the first-run seldom advertised to the maximum.

Q. In the period from 1933 to 1938, or until you became General Sales Manager in 1938, the actual contracts or proposals of contracts in the area, New York, Ohio, Kentucky, Maryland, Delaware and the District of Columbia, would not come to your attention, would they?

A. No, they would not.

Q. Take that same area in the period from the time you [fol. 4555] became General Manager and up to, we will say the beginning of 1942, what was your course with respect to contracts, applications, out of that area?

A. All contracts reached my desk and were approved or were rejected by me.

The Court: Out of what area?

Mr. McClennen: 1938 to the beginning of 1942.

The Court: What area?

Mr. McClennen: This same area, New York, Ohio, Kentucky, Maryland, Delaware and the District of Columbia.

The Court: How would he get those contracts?

Mr. McClennen: Because he was the General Sales Manager in that period.

The Court: You mean covering the whole United States?

Mr. McClennen: Covering the whole United States.

The Court: I beg your pardon. I was confused. I thought you spoke of the General Sales Manager for the eleven states, General Manager over the Sales Managers for the eleven states. All right.

Q. In that period, from the time when you became General Sales Manager in 1938 to January, we will say 1942, where there were possibilities of more than one customer in a town, what were the considerations which actuated you in determining whether to have applications solicited from [fol. 4556] given theatres or approving or disapproving applications when the contracts came to you for consideration?

A. We base that upon many conclusions. First of all, the reliability and dependability upon the contract that was submitted. Whether the exhibitor was aggressive, what performance on prior contracts, we had a selfish interest in the success of the pictures, because many of them played on percentage and we, naturally, wanted to be with those accounts that were capable of getting the greatest box office results out of our pictures.

Q. Did you in the period of your General Managership from 1938 up to the beginning of 1942 come into actual contact with the Schine Circuit representatives?

A. Only very rarely. My recollection is that I had inherited a franchise that had been made by my predecessor, John D. Clark.

Q. And you currently were aware of that franchise?

A. I was.

Q. When there is a franchise such as the one of Fox to the Schine Circuit, what is the method of determining what picture shall be played in what places and at what prices?

Mr. Wright: If the Court please, to the extent that that is covered by the franchise, I suppose it would not be com-
[fol. 4557] petent for this witness to say and it not appearing he had anything to do with the negotiations, I don't know how it would be competent to testify about it in any event.

Mr. McClennen: I only wish to offer it. If it is objected to, I await your Honor's ruling on the objection.

The Court: The franchises are the best evidence.

Q. Were you, while you were General Sales Manager, aware of the franchises that were outstanding or made in that period between Fox and the theatres of the country?

A. Yes.

Q. Without committing to the definition, the plaintiff has adopted as the definition of "franchise": A contract for product for a period of more than one year. In that period of four years could you approximate the number of different franchises that Fox had obtained in the country?

A. I would say, roughly, at least several hundred.

Q. Could you give me any idea of how many of those were with single theatre operators?

A. I would say about 150 of the 200, or more.

Q. What are the business considerations which in the course of the actual operation of this business led to appli-
[fol. 4558] cations by theatres for franchises or proffers by Fox to theatres of franchises?

A. Will you read that, please?

(Last question read.)

[fol. 4559] The Court: He can state the reason why they got the franchise.

Mr. Wright: I assume that the answer will be limited to his reasons as a distributor. He is not going to undertake to say why exhibitors——

The Court: He can say what reason they have for having the franchise.

A. I may say I think the reasons were mutual in so far as I doubt whether we could have sold a franchise that did not seem to offer advantages to an exhibitor, or from the same reasoning we rarely accepted a contract that was not equally mutual to us. In determining whether we would accept a franchise we took a lot of things into consideration, the size and location of the house, its operation, its maintenance, its aggressiveness, the honesty and the ability of the

exhibitor to carry out the terms of the franchise, and a lot of other similar reasons.

The Court: Was there any uniformity of tenure or duration, or did they vary?

The Witness: They varied. The terms were invariably very similar for the franchises. The length of time differed. Sometimes they were made for one, two, three or five years, depending upon the set-up.

[fol. 4560] By Mr. McClennen:

Q. I confine this question which I am about to put to you to your personal knowledge, not what you have been told by anybody else. To your knowledge has there been any conversation with any of the defendants, or their executives or employees, not to deal with any competing exhibitor or to restrict the terms of such dealings?

Mr. Wright: The same objection that we made to the same question.

The Court: Overruled.

A: There was never any conversation with me about any restrictions.

Mr. McClennen: That is all.

Cross-examination.

By Mr. Wright:

Q. I am not sure I understood what your position was from 1932 to 1938.

A. I was Division Sales Manager for 20th Century-Fox, operating in the eleven Western States.

Q. At that time who was the Eastern Sales Manager?

A. We had several district managers that operated in two or three States. John D. Clark was the General Sales Manager. Eddie Granger was here most of the time, I believe.

[fol. 4561] Q. As Eastern Sales Manager?

A. As Eastern Sales Manager.

Q. He was the one who had supervision over the States of New York, Ohio, Maryland and Kentucky?

A. I don't know his exact territory. He was back East here and I believe had that territory.

Mr. Wright: That is all.

Mr. McClennen: That is all.

(Short recess taken.)

FRANK J. A. MCCARTHY a witness called by and on behalf of the Defendants and having been first duly sworn was examined and testified as follows:

Direct examination.

By Mr. McClennen:

Q. What is your residence?

A. 117 Harmon Avenue, Pelham, New York.

Q. Your position?

A. Southern and Canadian Sales Manager of Universal Picture Corporation.

Q. When did you enter the motion picture distribution business?

A. I think it was in 1915 or 1916 in Boston.

[fol. 4562] Q. Will you trace on down to 1930 your positions and connection, briefly, giving the approximate dates?

A. Well, I started in Boston and then I enlisted in the First World War, and after my discharge from the Army I went back to the Fox Film Corporation and was the manager in Buffalo, N. Y., in 1918 or 1919. Then I went to Pittsburgh as the manager of the district office for approximately one year. After that I became the field representative of the General Sales Manager of the Fox Film Corporation, covering the eastern section of the United States.

Q. And that lasted until when?

A. That was until about 1920 or 1921. Then I went with Paramount as a special representative in Buffalo for about two years, I think, and then became the First National Manager in Buffalo until 1930. I left in either 1929 or 1930 and became the Universal Manager in Boston. I was there approximately a year.

Q. That was Branch Manager?

A. A branch manager.

Q. In Boston for Universal?

A. Yes, sir. I was there for not quite a year and I came to New York as the Eastern Division Sales Manager of [fol. 4563] Universal Pictures.

Q. And you occupied that position up to what time?

A. Until 1939 or 1940.

Q. And then you became what?

A. Southern and Canadian Sales Manager.

Q. During the period that you were Eastern Sales Manager for Universal did your territory include some or all

of these: New York, Ohio, Kentucky, Maryland, Delaware, and the District of Columbia?

A. It did.

Q. In that period who had the practical determination of whether an application for a contract in that area should be approved?

A. I did, with one exception, and that was where the General Sales Manager himself negotiated the deal.

Q. In that period when you were dealing with the approval or disapproval of contracts did you have come before you for consideration any contracts with the Schine Circuit?

A. Yes, sir.

Q. Did you become familiar with what were the competing theatres to the Schine Theatres?

A. At that time, yes.

Q. And did the applications for contracts for those competing theatres come before you for approval or disapproval?

[fol. 4564] A. Yes, sir.

Q. I confine this question which I am about to put to you to your personal knowledge, not what you have been told by anybody else. To your knowledge has there been any conversation with any of the defendants or their executives or employees not to deal with any competing exhibitor or to restrict the terms of such dealings?

A. Not to my knowledge.

Mr. Wright: The same objection as previously.

The Court: Yes. That is the same question you have had before. I think it would have more probative force if he were to testify to what he had done himself. It is sort of a negative answer.

Q. Will you relate at this distance of time what dealings you had directly with the Schine Circuit and with the representatives of opposition theatres? I don't mean you to go into detail with each one, but give to the Court some description of your dealings.

A. The opposition sales were not made by me, nor were they negotiated by me.

Q. How about the Schine Circuit?

A. I sat in on the negotiations for the Schine Circuit.

Q. Uniformly?

A. Not always.

[fol. 4565] Q. Was it the general course that you did?

A. That was the general course.

Mr. McClennen: That is all.

Cross-examination.

By Mr. Wright:

Q. A large part of the negotiations were conducted, were they not, by your exchange managers?

A. No, sir.

Q. Isn't that correct?

A. No sir.

Q. As to clearances?

A. I beg your pardon?

Q. How about as to clearances?

A. They sat in on clearances with the district manager.

Q. Who was that?

A. In that case it was Dave Miller.

Q. A large part of the negotiations, then, were carried on with Dave Miller; isn't that correct?

A. No, sir.

Q. What part of the negotiations were carried on with Dave Miller?

A. He merely sat in on the negotiations.

Q. He didn't have any negotiations that you didn't sit in on?

A. Not much.

[fol. 4566] Q. Will you answer the question?

Mr. Wright: Read the question.

(Question read.)

A. Yes, there were negotiations which I didn't sit in on.

Q. That Miller conducted; isn't that right?

A. No, sir.

Q. There were none of those?

A. Is that another question?

Q. There were none of those, no negotiations that Miller——

A. Not to my knowledge.

Q. I show you this letter that has been marked for identification as Exhibit 392. That is a copy of a letter you wrote?

A. That is right.

Q. And that letter I just showed you was written in response to the one I have handed you, marked for identification as No. 391, was it not?

A. This is 392?

Q. Yes. I say this 392 that you just looked at was written in response to the one I am now handing you, marked 391, was it not?

A. That is correct.

Mr. Wright: I will offer Exhibits 391 and 392 for identification in evidence.

(Thereupon the letter, November 14, 1938, referred to, previously marked as Plaintiff's Exhibit 391 for identifica-
[fol. 4567] tion was received in evidence.)

(Thereupon the carbon copy of letter, December 14, 1938, referred to, previously marked as Plaintiff's Exhibit 392 for identification was received in evidence.)

Mr. Wright: I will ask to have this letter marked with the next Plaintiff's Exhibit number for identification.

(Thereupon the carbon copy of letter, October 28, 1935, referred to was marked as Plaintiff's Exhibit 999 for identification.)

By Mr. Wright:

Q. I will hand you a copy of this letter, dated October 28, 1935, from Dave Miller to George Lynch, which is marked for identification as Exhibit 999, and which bears at the bottom the notation "Copies to F. J. A. McCarthy and Mr. P. T. Dana," and ask you if you recognize that as a copy of a letter that came to your attention?

A. Yes, sir.

[fol. 4568] Q. Who was Mr. Scully, who is referred to in this Exhibits 392 and 391?

A. General Sales Manager.

Q. For Universal, at that time?

A. That is right.

Q. And who was Mr. Granger, who is referred to in this Exhibit 999?

A. General Sales Manager.

Q. At the time that that was written?

A. That is correct.

Q. After you saw these letters, you still want to affirm the statement that there were no negotiations between Dave Miller and the Schine representatives?

A. Well, you must make a distinction. You first asked me if he negotiated a Schine Circuit deal. I said "No, he did not." That is an individual deal after the Circuit deal was made.

Q. It is a fact, is it not, that there were negotiations with respect to Universal Pictures played in the Schine Circuit which occurred between Dave Miller and representatives of Schine when you were not present, isn't that right?

A. Not the Circuit as a whole, no. Individual situation, yes, but not the Circuit deal, as a whole.

Q. By the Circuit deal, as a whole, you mean the time [fol. 4569] when you finally approved or disapproved a deal for the entire circuit?

A. No, I don't mean any such thing. I mean the entire negotiation of the deal, whether it took one week, two weeks, three weeks or when.

Q. I tried to understand what you mean when you said Miller might have negotiated for some of the situations in the circuit, but Miller didn't have any negotiations in reference to the Circuit as a whole?

A. I didn't negotiate——

Q. Except when you were present.

A. I didn't negotiate for any house in the Circuit deal, at the time the Circuit deal was made.

Q. You mean that was after the deal was made, Miller's negotiations?

A. That was acquired after the deal was made.

Q. As to all the negotiations that were with Miller for the Circuit as a whole, you were present, is that right?

A. At most of them.

Q. Is it all or most?

A. Well, some of them the general sales manager was there.

Q. That was either Scully or Granger during the period?

A. That was Granger during that time. It wasn't Scully. It was Granger.

The Court: Do I understand your answer to the last [fol. 4570] question to be there were times when the negotiation for the Schine Circuit was in its entirety when you were not present?

The Witness: Not that year in which that deal was negotiated, no, but in other years I may not have been there, but, if I sat in on any part of the Schine Circuit negotiations, I finished with it.

By Mr. Wright:

Q. That is in the years that you took part?

A. In the years I was in on the deal.

Q. You finished it up?

A. That is right.

Q. But there were, of course, years in which it was apparently handled by Miller and Granger or Miller and Scully?

A. Handled by Granger or handled by Scully, not only Miller sat in, but you had a branch manager there in the office affected.

Q. That would be possibly Dana or some of the others?

A. That is right.

Q. Did I understand you correctly as saying clearance negotiations were not carried on by branch managers?

A. No, not to my knowledge.

Q. Do you know whether they were or not?

[fol. 4571] A. I doubt very much if they were carried on by the branch manager alone.

Q. You don't know, though?

A. No, I don't know.

Mr. Wright: If the Court please, we seem to be missing a few documents. I can locate them in a few minutes. I don't know whether your Honor wants to take a recess or not.

The Court: Have you another witness here?

Mr. McClennen: I have no one in the court room at the present moment and I think I haven't anybody in town now.

Mr. Wright: The only thing we have left—my impression is there was some merely identified material which relates to this witness that I wanted to offer and that is what I wanted to clear up before he left the stand.

Mr. McClennen: As far as that is concerned, when it is located no formality will be necessary. The fact that the witness has left the stand I shan't press as a witness why the document should not be admitted if otherwise it is appropriate.

The Court: Is that satisfactory, Mr. Wright, so we can [fol. 4572] dispense with the witness then?

Mr. Wright: I suppose under those conditions it wouldn't be necessary to hold him.

The Court: Is that for identification, as I understand?

Mr. Wright: It is identified material that we would want to offer.

The Court: Anything else today, then?

Mr. McClennen: That ends Mr. McCarthy, then?

Mr. Wright: Yes.

Mr. McClennen: That is all, Mr. McCarthy.

If your Honor please, as I say I haven't any one else here. If we are successful in getting in the witnesses that we hope for, we hope to be able to rest the defendants' evidence tomorrow morning, November 9th, before the noon recess. I can't be sure that they will get here.

The Court: What is your pleasure, then?

Mr. Wright: We, of course, would like to finish with our rebuttal just as quickly as we can. We are taken somewhat by surprise by the timing. Mr. McClennen told me this morning he might rest tomorrow. We will do the best [fols. 4573-4575] we can to line up rebuttal material to go ahead perhaps through tomorrow noon.

Mr. McClennen: That is my hope now if I can get the witnesses here.

The Court: Will you go right on with rebuttal then?

Mr. Wright: Go on tomorrow and Friday, and I think we should be able to finish up Monday, close our rebuttal by Monday.

The Court: That is more progressive than I had in mind or thought.

We will adjourn until tomorrow morning at 10:15. We have naturalization first.

(Whereupon a recess was taken until Thursday, November 9th, 1944, at 10:15 o'clock A. M.)

[fol. 4576] UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

Civil 223

UNITED STATES OF AMERICA

vs.

SCHINE CHAIN THEATRES, INC., ET AL., Defendants

Continuation of trial before Honorable John Knight, United States District Judge for the Western District of New York, November 9, 1944, 10:15 o'clock A. M.

APPEARANCES:

Robert L. Wright, Esq., John F. Clagett, Esq., Harold L. Schilz, Esq., Philip Marcus, Esq., Special Assistants to the Attorney General, and Milton Kallis, Esq., Special Attorney in behalf of the United States.

Edward F. McClennen, Esq., Willard S. McKay, Esq., Saul E. Rogers, Esq., Arthur E. Whittemore, Esq., Arthur J. Homans, Esq., and Howard M. Antevil, Esq., appearing for the Defendants.

[fol. 4577] PROCEEDINGS

Mr. Wright: If the Court please, I have this material here now with reference to Mr. McCarthy that was mentioned yesterday, and also another letter not previously identified, which I spoke to Mr. McClennen about. It appears that there are two letters dated December 14, written by Mr. McCarthy in response to the letter which went in evidence as Exhibit 391. The one which he wrote to Mr. Dave Miller, of that date, went into evidence as Exhibit 392. I should also have shown him at the time the letter of the same date to Mr. Paul Baron, which I will ask to have marked with the next exhibit number.

(Thereupon the carbon copy of letter, December 14, 1938, referred to was marked as Plaintiff's Exhibit 1000 for identification.)

Mr. Wright: I think it is understood that his testimony would have been the same with respect to this Exhibit 1000 for identification as with respect to Exhibit 392, that it was written in response to Exhibit 391.

Mr. McClennen: We concede that it may be taken that [fol. 4578] Mr. McCarthy so testified.

Mr. Wright: Then we will offer Exhibit 1000 for identification in evidence, and we also offer previously identified exhibits 389, 409, and 999 in evidence under the same numbers.

Mr. McClennen: The Exhibit 999 that was identified yesterday there is no objection to. It shows that a copy was sent to Mr. McCarthy.

(Thereupon the copy of letter, previously marked as Plaintiff's Exhibit 999 for identification was received in evidence.)

Mr. McClennen: Exhibit 409 for identification, from Mr. Dana to Mr. McCarthy, of September 23, 1935, we make the objection to it that we have to other inter-office communications, which I assume your Honor overrules.

The Court: Yes.

(Thereupon the communication of Sept. 23, 1935, Dana to McCarthy previously marked as Plaintiff's Exhibit 409 for identification was received in evidence.)

Mr. McClennen: Exhibit 389, February 7, 1938, from Mr. Dana to Mr. Herman, with a copy to Mr. McCarthy, we make that same objection to.

The Court: Same ruling.

[fol. 4579] (Thereupon the communication, February 7, 1938, Dana to Herman, previously marked as Plaintiff's Exhibit 389 was received in evidence.)

(Thereupon the carbon copy of letter, December 14, 1938, previously marked as Plaintiff's Exhibit 1000 was received in evidence.)

Mr. McClennen: Yesterday, if your Honor please, you admitted for us Exhibits D-170 and D-171 on our assurance that we would procure the letter from the attorney showing the source.

Mr. Wright: Mr. McClennen has shown me the letter. We are satisfied that they came from the files of the Warner Company.

The Court: They were received yesterday.

Mr. McClennen: The letter shows the fact that they were discovered on November 2, 1944, in the files of the Cleveland Exchange.

The Court: Very well.

[fol. 4580] GRADWELL LEBERTHON SEARS, a witness called by and on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. McClennen:

Q. Your residence?

A. Harrison, New York.

Q. Your position?

A. I am Vice President of United Artists Pictures Corporation of Delaware.

Q. That "of Delaware" refers to the Incorporation State?

A. Yes.

Q. And that is the United Artists Corporation that distributes the United Artists pictures, is it?

A. Yes, sir.

Q. Will you relate briefly by date positions and companies your entry and pursuit in the moving picture distribution business from the beginning?

A. I started to work for the World Film Corporation in New York City selling pictures in 1919. I was subsequently transferred to St. Louis, and I was there until December, 1920, which time I went to Chicago and I was in Chicago [fol. 4581] with the First National Pictures Corporation from December, 1920 until August, 1925. I became Branch Manager of the Cleveland, Ohio, Exchange of First National Pictures in August, 1925, and remained there until 1928. In 1928 I returned to Chicago as Chicago Branch Manager. I was there until maybe 1929. I came in to New York as the Western Sales Manager of First National Pictures. Subsequently, Warner or Vitagraph, rather, and First National were merged, and I became Western Sales Manager of the combined operation, and I was in that capacity until about, I would say, 1936. Early in 1936 I became General Sales Manager and President of Vitagraph Corporation,

which position I occupied until October, 1941, and I severed my connection with Warner Brothers and joined United Artists shortly after, and I am still with United Artists.

Q. And in your present position with United Artists beginning in 1941?

A. Yes, I started in October, 1941, with United Artists.

Q. Mr. Sears, I show you contract of Warner Brothers, dated October 13, 1937, approved October 27th, 1937, with your stamp signature with Belpik Theatre Corporation, the Schine organization, for the Princess Theatre, Medina, Ohio, marked Exhibit 635.

Mr. Wright: If it is one document taken from a folder [fol. 4582] which is mark 1 for identification as 635—there are a number of other contracts in the folder.

The Court: Is there a mark on it?

Mr. McClennen: It has the identification mark, but none on the paper itself.

The Court: Well, let it show for itself what it is, 635?

Mr. McClennen: Marked for identification as Exhibit 635.

The Court: Not in evidence?

Mr. McClennen: And I think a copy is in evidence with a sub-lettering, but I am not sure, and to avoid any doubt I will put this in as Defendants' D-173.

The Court: You have two markings, then?

Mr. McClennen: This 635 is merely the bulk identification marking. There is nothing on the paper itself.

(Thereupon contract of Warner Brothers, dated October 13, 1937, with Belpik Theatre Corporation for the Princess Theatre, Medina, Ohio, was marked as Defendants' Exhibit D-173 for identification.)

[fol. 4583] Mr. McClennen: It may be noted that we are in doubt at the moment whether this is a duplication of another exhibit or not.

Q. Mr. Sears, at the time this contract was approved had you heard of any claim by Mr. Essick or Mr. Fine that Mr. Kalmenson had promised them this product for their new theatre soon to open in Medina, Ohio?

A. No, sir.

Q. Mr. Essick has testified that in November, 1937, when the matter came up at the New York office of Vitagraph—and the testimony is at page 1824—Mr. Kalmenson denied that he had made any such promise. Do you remember

whether Mr. Kalmenson's denial was brought to your attention?

A. It was.

Mr. Wright: If the Court please, that calls for a conclusion there as to what——

The Court: Is it not hearsay, brought to his attention?

Mr. McClennen: I just wanted to make sure that he did know of the denial. That is, Mr. Essick has testified that when the claim was made that Kalmenson had made the promise that Kalmenson then denied it, and I am merely asking whether that denial came to the attention of Mr. Sears.

[fol. 4584] Mr. Wright: I think again, if the Court please, that Mr. Kalmenson would be the man who would have to be here to testify to whatever he had done.

Mr. McClennen: Mr. Kalmenson would not be the man that knew whether it came to Mr. Sears' attention. There is no dispute about the fact. Mr. Essick has testified that Kalmenson denied that he made the promise. I am merely asking whether the fact that Mr. Kalmenson had denied the promise came to Mr. Sears' attention.

The Court: You do not claim that Mr. Sears was there at the time the claimed denial was made, do you?

Mr. McClennen: I am not sure about that.

Q. Were you present when Mr. Kalmenson made the denial?

A. No, sir.

Mr. McClennen: I still press the question as to whether it did come to his attention that the denial had taken place.

The Court: Well, the form of your question is objectionable. It calls for a hearsay conversation. He could testify that he knew there had been a denial of the making of this contract.

Q. Well, you did know at the time that Kalmenson had [fol. 4585] denied that he had made such an agreement?

A. That is right.

Mr. McClennen: That is all I care for on that.

Q. Mr. Sears, in the period from 1931 to the beginning of 1942, first, with your connection with Warner's, Vita-

graph and thereafter with United Artists, you knew of the Schine Circuit?

A. Yes, sir.

Q. Did you personally have any dealings with the Schine Circuit in connection with the negotiation or consideration of their applications for product and contracts made with them?

A. On occasion during that period.

Q. I confine this question which I am about to put to you to your personal knowledge, not what you have been told by anybody else. To your knowledge has there been any conversation with any of the defendants, or their executives or employees, not to deal with any competing exhibitor or to restrict the terms of such dealings?

A. No, sir, at no time.

Mr. McClennen: You may ask.

Cross-examination.

By Mr. Wright:

Q. Mr. Sears, did I understand you to say on your direct [fol. 4586] examination that at the time that this contract which was just shown you, that you have in front of you, was made there, you hadn't heard of any claim that the product involved there had been promised to Essick and Fine, but that you had heard that Kalmenson had denied promising it to them?

Mr. McClennen: No, that is not his testimony.

Mr. Wright: I am just trying to find out. That is the way I understood it. Read the record.

Mr. McClennen: Will you read the record of Mr. Sears' answers to these questions?

(Testimony read.)

Mr. Wright: Now read my last question again.

(Last question read.)

Mr. McClennen: That question I object to.

The Court: If you put the last part alone it would meet the objection, I think. I mean the very last statement there whether he had learned that Kalmenson had denied it.

By Mr. Wright:

Q. As I understand it, before you approved this contract that is marked in evidence as D-173, you had, you say, been informed that Mr. Kalmenson had denied promising that product to Essick and Fine; is that right?

Mr. McClennen: That question I object to because the [fol. 4587] examiner has no right to state his understanding.

The Court: That is as I understand it.

Mr. McClennen: If your Honor please, it is clearly stated in the questions and answers. The contract that was approved when he had no knowledge of any such claim was approved on October 27, 1937. Thereafter, in November, it appears that Mr. Essick appeared at the office and made a claim which Mr. Kalmenson had denied in November, a month or so after this contract had been made. That is the first time there is any suggestion of any denial that could come to Mr. Sears' attention, and for the question to assume a misstatement of this testimony makes it objectionable.

The Court: I do not understand it to be a misstatement of his testimony. Irrespective of the dates I think the question is exactly the question that you put to him.

Mr. McClennen: May I have the question read, so that you may see the misassumption in Mr. Wright's question? That is, he assumes that Mr. Sears has testified that at or [fol. 4588] before November 27th——

The Court: He has not referred to any date whatsoever. He is referring to the question of whether he had knowledge that there had been a denial by Mr. Kalmenson.

Mr. McClennen: At the time he approved this contract of October 27th; that is the objection I make to the question.

The Court: Is that a part of your question, Mr. Wright?

Mr. Wright: I think it was.

(Question read.)

Mr. McClennen: I have no objection, if your Honor please, to a question by Mr. Wright as to whether on October 27th he knew that or had heard that. What I am objecting to is the assertion by Mr. Wright in the question of something that the witness has not testified to, wholly unnecessary for the question. If he wants to know what he knew at any given time it is a perfectly simple thing to ask him.

(Question read.)

By Mr. Wright:

Q. I will put it in this form: Is that a fact?

Mr. McClennen: That is objected to because it does not [fol. 4589] appear except by reference back to several questions what he means by "is that a fact".

The Court: Clarify the question.

Q. At the time that you approved this contract D-173 had you then been informed that Kalmenson had denied promising the product to Essick and Fine?

A. No, sir.

[fol. 4590] Q. You are positive of that?

A. Yes, sir.

Q. How do you know? Do you have any memorandum or anything which would indicate that to you?

A. No, sir.

Q. What did you do to refresh your recollection on that point before you came here today?

A. Nothing.

Q. You just as you sat there remember when you saw that contract—you haven't had any prior knowledge of that dispute between Essick and Fine and Kalmenson about Medina, is that right?

A. Right.

Q. Then you say you did get knowledge of the dispute when?

A. Subsequent to the first Essick visit to New York.

Q. And is that the way you fixed the time?

A. Fixed what time?

Q. The time when the matter came to your attention.

A. The matter came to my attention after a contract had already been approved with Schine.

Q. You mean after you made—you first had made, had you not, a contract for the entire product with Schine, is that right?

A. That is right.

Q. You remember as part of your franchise you made a [fol. 4591] three-year deal there?

A. That is my recollection of it.

Q. Selling all the pictures to Schine?

A. That is right.

Q. Then you made this contract that is front of you selling half the pictures to Schine, is that right?

Mr. McClennen: Mr. Wright, this contract is not half the pictures, is it?

Mr. Wright: It looks that way to me.

The Court: Let the witness examine it, and he can answer the question.

Mr. McClennen: Where do you see "half the pictures"?

Mr. Wright: I beg your pardon.

By Mr. Wright:

Q. This is the contract for all of the pictures executed pursuant to the franchise, is that right?

A. That is correct.

Q. And then it was after you learned of the complaint and Kalmenson's denial that you made a contract with Schine for half the pictures and with Essick and Fine for half the pictures, is that right?

A. That is correct.

Mr. Wright: I had assumed in my question it was a contract for half. I now see it is a contract for all.

[fol. 4592] The Court: It is a contract for all?

Mr. Wright: Yes, that I believe is in evidence as Exhibit 635-C.

The Court: What date is that?

Mr. Wright: That bears the date January 18, 1938.

Q. You recognize this contract in evidence, Exhibit 635-C as the contract that was made for half the pictures with Mr. Schine or with the Schine Circuit? (A pause).

Mr. Wright: This is the Essick contract.

Mr. McClennen: What is the date of the one you have just shown him?

Mr. Wright: This is January.

Mr. McClennen: January, '38.

Mr. Wright: The contract I would like to have is the one which was made with Schine for half the product.

Mr. McClennen: Is this 635-C the contract with Fine and Essick?

Mr. Wright: Yes, this is for half. I am looking for the contract that Schine had.

By Mr. Wright:

Q. While we are looking for the copy of the contract that was made with Schine for half of that same season's

product that is covered by these Exhibits D-173 and 635-C, you do remember that after you found out about the Fine [fol.4593] and Essick claim and the Kalmenson denial, you then made this contract for half the pictures with Fine and Essick, which is marked 635-C?

A. Yes, sir.

Q. And you also, at or about the same time, made a new contract for the other half with Schine, is that right?

A. That is correct.

Q. And both those contracts were made after you found out about the claim that they had made and Kalmenson's denial?

A. That is correct.

The Court: What was the reason for modifying this original contract?

The Witness: At the time the original contract was modified apparently between two of our customers there was a disagreement as to what one of our representatives had allegedly agreed, and I have always found it is the surest policy in a disagreement of that kind to customers is to try to do a Solomon and give each one of them half of the product and, in that way, avoid a lot of difficulty.

The Court: You understood your representative agreed to it?

The Witness: That is right.

The Court: That included one-half of the product in [fol. 4594] the contract?

The Witness: Yes. We simply took the entire product and gave one-half, and the other half.

Mr. Wright: We haven't been able to locate any contract other than this deal sheet which is marked in evidence as W-4 (37).

By Mr. Wright:

Q. Do you recognize that as the deal sheet for Medina on the three-year franchise deal?

Mr. Wright: That is in evidence.

Mr. McClennen: What is the number?

Mr. Wright: W-4 (37).

Mr. McClennen: And the date?

The Court: Where did you get the "W"?

Mr. Wright: Because it came from the Warner Company.

The Court: I didn't know it was marked that way.
Mr. Wright: It was identified before. The exhibit number is W-4-(37).
Mr. McClennen: The date is September 28th, 1937.
The Court: Read the question.

(Last question read.)

The Witness: Yes, sir.

By Mr. Wright:

Q. This notation on there, this deal which you see at the bottom reading "This deal was later changed to read [fol. 4595] "Split deal 50 per cent with the opposition", that has the same initials, do you recognize the handwriting or the initials?

A. No, I do not.

Q. Is it your recollection that the half of that, half of the product covered by this contract, Exhibit D-173, that you ultimately sold to Schine was served under the same terms that are set forth in this deal sheet W-4 (37)?

The Witness: May I have the question, please?

(Question read.)

The Witness: That is my recollection.
The Court: Served or sold, the same terms?
Mr. Wright: Yes.
Mr. McClennen: The deal sheet being for the whole preceding——
The Court: September?
Mr. McClennen: That is in September—preceding the contract D-173.
The Court: There is no question half of it was sold later.
Mr. McClennen: There is no question.
Mr. Wright: All I want to do is establish the terms under which it was sold.
The Court: He said the same terms.
Mr. Wright: I think that is all.
[fol. 4596] Mr. McClennen: That is all.
The Court: Next witness.
Mr. McClennen: I beg your pardon.

Q. I am told that I did not ask you to define your duties with the United Artists so far as distribution is concerned.

A. I am the General Manager of world wide distribution for United Artists.

Q. And have been ever since you joined United Artists?

The Court: That is '41.

The Witness: I have been in charge of domestic distribution. I am now in charge of foreign distribution as well. Is that all?

Mr. McClennen: That is all. Thank you.

NEIL FRANCIS AGNEW, a witness called by and on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. McClennen:

Q. Your residence?

A. New York City.

Q. Your position?

[fol. 4597] A. I am representing Mr. David Selznick and Vice President of the Vanguard Film Company at present.

Q. Will you begin at the beginning of your connection with the moving picture distribution business giving approximately the position that you held, with what company, during what dates?

A. I started in 1920, January of that year, working in the Chicago Exchange of the Paramount Company as booker. I became a salesman there three or four months later, and after a lapse of about a year and a half I went to Milwaukee in charge of their Milwaukee office. I was there for about two years, and then transferred to Chicago as Chicago Branch Manager for the same company. Later I became district manager in that same territory, covering the Chicago Exchange territory, the Detroit, Indianapolis and Milwaukee territories. In 1932 I was called in to New York to take charge of the Western Division for Paramount sales.

Q. By Western Division you mean what territory?

A. Well, generally the territory represented west of the Mississippi River, but from—the Chicago-Detroit District also was in the Western Division, everything west of that.

Q. Then if you will continue.

A. Yes, then from that time about two years later I [fol. 4598] became Assistant Sales Manager.

Q. That would be something like 1934?

A. Yes, 1934.

Q. And that was Assistant Sales Manager for the whole country?

A. For the domestic department, yes, all of the United States and Canada. In 1936 I became General Sales Manager for Paramount in charge of the domestic territory. I was there in that capacity until last April.

Q. That is, April, 1944?

A. 1944, that is right.

Q. Mr. Agnew, do you recall some season years in which Paramount did not come to terms with any theatres in which the Shea Circuit or Mr. Shea had an interest?

A. Mr. Mort Shea?

Q. Mr. Mort Shea.

A. Yes, there was a season I should say about '33-'34 when at least for a greater part of the season Paramount did not sell the Shea Circuit.

[fol. 4599] Mr. McClennen: Mr. Wallace has testified to this fact, if your Honor please, at pages 3096 and 3097.

Q. What did you do or direct to be done in the effort to place the Paramount product where the Shea negotiations had broken down in towns where the theatre in which Shea was interested had been the regular customer in the past?

A. That season I had no personal jurisdiction over that territory in which the Shea circuit was located.

Q. Did you know what was done?

A. I remember that wherever pictures could be sold to an opposition theatre they made the attempt at least to sell them and did sell a number of them.

The Court: You mean in opposition to Shea?

The Witness: Yes.

Mr. McClennen: It has appeared, if your Honor please, that Shea and Schine were interested in the theatres in Auburn.

Q. I show you Exhibit 814, which is a contract of February 8, 1934, for the Capitol Theatre in Auburn, with the Auburn Theatre Corporation. Am I right in understanding that you did not have to do with that particular contract yourself? The copy there is not the approved copy. It does not have any Paramount signature on it, but there is no question that it is such a contract.

[fol. 4600] A. No, I had nothing to do with this contract.

Q. In subsequent years was effort made to restore the relations with the Shea theatres and get the Paramount product into those theatres as they had been before the interruption?

A. Yes, sir.

Mr. Wright: If the Court please, I suppose what should be offered, if anything, is what was done or what was said.

The Court: It calls for his conclusion. He may state what was done.

Q. After the 1934-1934 season did you have dealings with the Shea circuit and the Schine circuit yourself?

A. In the case of the Shea circuit I had some dealings with Mr. Shea and his associates. I don't recall ever having dealt directly with the Schine circuit.

Q. What did you do in the effort to get the product restored into the Shea theatres?

Mr. Wright: There is not any testimony yet that he did anything.

Q. Did you do something?

A. Yes, sir.

Q. What did you do?

A. Mr. Shea came in to see me and related his difficulties——

Mr. Wright: If the Court please, I do not see that what [fol. 4601] passed between Mr. Shea and this witness would be relevant in any event.

The Court: Mr. Shea came in to see him. He may say what was done.

Q. What was done as a result?

A. He related his difficulties and his viewpoint with respect to his inability to buy the pictures.

The Court: The conversation is not competent.

Q. Did you then sell pictures generally throughout the Shea Circuit?

A. We did.

Q. Mr. Agnew, in the period when you were General Sales Manager of Paramount, in dealing with a theatre in a town where there was no other theatre or no other

first-run theatre, what were the elements that you had to take into consideration in the competition with the other distributors to get the Paramount pictures placed in that theatre?

A. Well, naturally, you would emphasize the desirability of the pictures you were selling and try to create a greater demand in the man's mind for the product. You have to compete with the other people who offered pictures for sale, based on price, runs and such things as clearance, where there were other subsequent run theatres in the town. [fol. 4602] Q. Will you describe in that connection what preferred playing time is and what competition you encounter in getting the preferred playing time? And I am limiting this to the period prior to 1942, while you were General Sales Manager.

A. Well, preferred playing time, as known in the industry generally, is Saturday and/or Sunday. At that time, if I remember correctly, the preferred playing time in the smaller towns was divided between the Saturday run and the Sunday run pretty generally. In other words, very seldom did any picture exhibition get both days of the same week. The limits therefore were 104 pretty generally, and in week-run situations naturally 52.

Q. What is the reason for the desire of a particular distributor to get as much as possible of the preferred playing time?

A. Well, the general theatre attendance on Saturday and Sunday is greater, all other things being equal. Therefore his earning capacity is greater.

Q. And in negotiating for the preferred playing time do you encounter the competition of the other distributors who want that same preferred playing time?

A. You do.

Q. Take it even before you became General Sales Manager [fol. 4603] and while you were Western Division Manager, you were familiar with Paramount General sales policy throughout the country?

A. Yes, sir.

Q. In the earlier days when did the season's effort begin to get the contracts placed for the on-coming season?

A. Any time from the first of July on.

Q. And what were the significant steps in the sales effort?

A. Well in those days the sales effort generally was pre-

ceded by a sales convention or a series of them, in which the company announced most of the product which they intended to release for the ensuing season. Booklets sometimes were made up with descriptive matter with respect to the pictures, the names of the players, and so forth, and these were circulated in the trade, advertised in the trade papers, and usually copies of them were carried by the salesmen when they went out to solicit the sale of pictures, and all other available information. Following the announcement, so-called, of the product of each of the companies, the sales effort then became general with respect to soliciting exhibitors.

Q. As time went on was there any change in the dates of the beginnings of the sales effort?

A. In the very early period in the '20s those meetings [fol. 4604] and the things which I have just described began in September, but there was found to be a great eagerness because of the competitive situation with each of the companies to get out a little further in front in advance of the season with their sales, and that gradually moved up the selling period from September and August up to as early as July because of the desirability of getting in there first and selling the pictures before the other fellow was there, I suppose.

Q. Have you heard or read the testimony of any of the other sales managers for the other distributors in this present case?

A. Just Mr. Sears.

Q. Mr. Sears is the only one that you have heard or read?

A. That is right.

Q. Have you had occasion during the period that you were General Sales Manager for Paramount to familiarize yourself with the similarity and differences of sales policy as pursued by your competitor distributors?

A. Some of the policies of the other companies with respect to details of sales were known to the salesmen because of the exchange of opinions with the exhibitors. Exhibitors would and do make a point very often of the much easier sales policy of another company. In that way such information did become general property with respect to [fol. 4605] certain general matters of how many pictures they would accept as a minimum number and matters that are of trade interest of that sort.

Q. Take it in the period that you were General Sales Manager, in the sale of the Paramount product where there was more than one possible first-run theatre in the town or subsequent-run theatres, what were the considerations which you had before you in determining which theatre in the town you would have your sales force seek to get your pictures into or where you would approve applications for contracts from those theatres when they came in?

A. Well, the general considerations are numerous. One that we particularly valued was the length of the service of the customer, the length of time in which we had sold pictures to that particular account. Paramount was one of the older companies in the business and therefore a great many of these exhibitor customers of ours rather grew up with the company.

Other practical considerations would be the location and the size of the theatre, the manner in which the theatre was operated, if there was a choice to be made in that direction, and the ability of the theatre to earn film rental. The most film rental was of course a major consideration.

[fol. 4606] Q. Where you sold your pictures on percentage it is, of course, obvious that your interest was in the grossing powers of the theatre. Will you state how you are interested in that question where the picture was sold for a flat rental?

A. The desirablitiy of the theatre was always a consideration, because it was of value to be associated with the better type of operation, and also again, even through a picture was sold on flat rental, the earning power of the theatre and the good will of the theatre in the community was of great value because a flat rental picture, in the final analysis, has to earn its way just as well as a percentage picture does.

To keep a satisfied exhibitor you must make a profit with your pictures, both flat rental and percentage pictures.

Q. Where a picture has been licensed at a flat rental, on the expectations, but for some reason it appears to be a flop in that theatre, what is the customary thing that happens?

A. Well, it is customary in the trade, because of the fact that we more or less deal in intangible values, to make an exhibitor an adjustment of the price of that flat rental picture. I think more accurately you could say that that adjustment would be made on a number of pictures rather [fol. 4607] than on individual pictures, unless it happened

to be a very important picture, a high-priced picture, which was sold alone and by itself. Otherwise adjustments became seasonal things, rather than individual picture problems.

Q. In fixing the flat rental for a given year what consideration is given to what the theatre has done in the prior years in the matter of gross box-office receipts?

A. The first consideration is his ability to earn, what he has been able to accomplish with the product in the preceding seasons, what his current level of business is, and a general consideration of the overhead operation, and the matter of what we mutually agree is a fair profit.

Q. In the period between 1942, when you were General Sales Manager of Paramount, can you say with any approximation what proportion the film rentals from the whole United States came from the first-run theatres?

A. Of course you mean by first-run all first-runs, cities, villages, everywhere, do you not?

Q. Yes.

A. About 70 to 75 per cent, I should say.

Q. Can you state with any approximaton how much the first-run revenue came from, as you put it, towns, villages [fol. 4608] and cities, say, under 50,000 population?

A. This would have to be an approximation. I should say that under 50,000, in the first-runs only——

Q. In the first-runs only.

A. You probably get about 35 per cent.

Q. Now let me see if I correctly re-state what this is: That is, of your total film revenue, you get from 25 to 30 per cent from subsequent-run houses, from 70 to 75 per cent from first-run houses, of which some 35 per cent comes from the under 50,000 places and the other 35 to 40 per cent from the over 50,000 places?

A. Yes. I think perhaps that figure a little higher with respect to the under 50,000. At one time it was 33⅓ in the case of Paramount, but I should say today it is probably less than that. Perhaps 25.

Q. When you say today, to make that more specific, we will say in the year 1941, what would you say was——

A. I should say instead of 35 it would be 25 to 30, perhaps.

[fol. 4609] The Court: That depends somewhat on the quality of the film?

The Witness: Yes, but those figures are annual figures based on your general average performance over the year.

Q. Take it in the year 1939, or thereabouts, approximately what percentage of the total film revenue of Paramount came from the Schine Circuit?

A. I never have computed it, but I would risk a guess of about one per cent, I guess.

Q. It has appeared in contracts in evidence that there were provisions as to the amount of the rate of admission prices that the exhibitor was charging. Will you state the considerations leading the distributor to have those provisions in the contracts?

A. Generally, they were recorded in contracts normal admissions, but very rarely where the consideration with respect to the sale, once you had determined all of the other factors and the desirable theatre, the admission scale was also desirable, and, therefore, was not a point at issue in making a sale, but contracts generally did carry a record of what that admission scale was. In the case of our company we had a minimum admission requirement of 15 cents. We didn't care to sell theatres charging less than that.

[fol. 4610] The Court: For any run, you mean?

The Witness: Yes, sir.

Q. If the admission price was cut from that stated in the contract by the exhibitor, or if he reduced his admission prices by the device of two for one bargains, and so forth, not usually was the distributor interested in that dispute from the contract?

A. Well, a reasonable fluctuation in admission policy over the year was not regarded as a reason for dispute with the exhibitor. Occasionally, however, an exhibitor would go out on a campaign of slashing admission prices, obviously to hurt his competitor to the point where the prestige of the pictures and the theatre itself were reduced. In those cases we generally had discussion with the exhibitor and brought about some amicable settlement of the matter, or, in some rare instances we had to choose not to sell until he did change his price policy, where we felt we were seriously affected.

Q. The plaintiff in this case has adopted as the definition for franchise a contract for more than one year season's product. Without asking you to adopt that franchise defini-

tion, either as correct or otherwise, but assuming it for the purpose of the question that I am putting to you, has Paramount from time to time in the period of 1931 to 1940 issued franchises?

[fol. 4611] A. Yes, we had some.

Q. And in issuing those franchises has distinction been made by the producer controlled theatres, independent circuits and exhibitors operating one theatre only?

Mr. Wright: If the Court please, that is objected to as calling for a conclusion. It would be necessarily based upon an examination of the wide course of dealing which is not in evidence in this case. It is a conclusion, I suppose, that would have to be drawn.

The Court: Read the question.

(Last question read.)

The Court: Well, state whether franchises of these various types of exhibitors——

Mr. Wright: Yes, he can state what they did.

Q. Will you state what Paramount did in each respect?

A. We had had franchises, so-called, two-year deals, and the greater length of time with a limited number of those franchises with different type of theatre operation, circuits and otherwise. I don't recall any number at the present time, but we had them.

Q. Well, take it in the year 1939-40, or thereabouts, could you approximate how many franchises Paramount had outstanding with a single-theatre operators?

[fol. 4612] A. Well, I recall one. At the present time—that is of the time of which you speak—we had a franchise, Paramount had a franchise, with a theatre operator in Champaign, Illinois. In 1939 we had discouraged the sale of franchises previous to that for the past four or five previous years, and they were diminishing rapidly in numbers at the time you state, and we had only a limited number of them of any kind at that date. I don't remember any others of any consequence of single operation.

Q. Take it back before you had this disposition to depart from the operation by franchise, say 1934, could you approximate the number of franchises with single-theatre operators at that time?

A. Not with any accuracy, but I would think there were at least 12 or 15 in existence at that time, at some period

during that time.

Q. Do you remember whether at any time the Schine Circuit had a franchise with Paramount?

A. Yes, I believe they did.

Q. And do you remember when that was?

A. I don't remember the years, no.

Q. Within any recent years back of 1940, did Schine have any franchise?

A. I would say perhaps in 1938, '39, '37, along there.

[fol. 4613] Q. And do you remember whether that was for the entire circuit?

A. No, I don't.

Q. I confine this question which I am about to put to you to your personal knowledge, not what you have been told by anybody else. To your knowledge has there been any conversation with any of the defendants or their executives or employees not to deal with any competing exhibitor, or to restrict the terms of such dealings?

A. No, sir.

Mr. Wright: If the Court please, I make the same objection I made previously. I omitted to make the same objection when it was asked of Mr. Sears, and I would like to have it considered recorded to that question also.

The Court: All right.

Mr. Wright: Did he answer?

Mr. McClennen: Yes.

Mr. Wright: The answer is "No."

If the Court please, I wonder if we could have a little recess?

The Court: It is 12 o'clock. We could recess now.

Mr. Wright: I think we can finish with him in five minutes.

The Court: All right, a short recess.

[fol. 4614] (Short recess.)

By Mr. McClennen:

Q. Mr. Agnew, I find that I confined my question too narrowly to you, and I want to put another one. Along in the middle of the 30s, say 1934, how many franchises did Paramount have out with strictly independent theatre operators operating not more than five theatres and not affiliated with any circuit?

A. I should say 60 to 70. You asked me first about individual theatres, did you not?

Q. Yes.

The Court: How many franchises do you recall that you had altogether.

The Witness: Probably double that number at that time.

The Court: Altogether?

The Witness: Altogether.

The Court: All franchises?

The Witness: Yes, sir.

Mr. McClennen: That is all. Thank you.

Mr. Wright: That is all.

Mr. McClennen: No cross-examination?

Mr. Wright: No, no further questions.

Mr. McClennen: If your Honor please, the defendant filed in May, 1944, notice to admit facts addressed to the plaintiff. [fol. 4615] The answers are on file and they are brief those that we wish to put in evidence, and I, therefore, will read them.

"No. 1. In response to paragraph 1, plaintiff admits that for the past fifteen to twenty years the normal method of licensing the exhibition of copyrighted motion pictures photoplays in the United States of America, including the States of New York, Ohio, Kentucky, Maryland, Delaware and Virginia, has been and now is on a so-called run basis, to wit: for a first-run, to a theatre in a local competitive area with such exclusive exhibition rights and clearance privilege, if any, as may be appropriate to the successful exploitation of said copyrights in said area; for such subsequent runs in said area, and with such exclusive exhibition rights and clearance privileges, if any, as may be appropriate to the successful exploitation of said copyrights in said area. Except as admitted herein the truth of the facts stated in said paragraph is denied.

[fol. 4616] 2. In response to paragraph 2, plaintiff admits that it has been the usual and customary practice for the distributor to agree with its licenses that it will not exhibit or grant a license to exhibit its photoplays for exhibition in conflict with the run licensed the exhibitor or prior to the clearance period agreed upon with the exhibitor. Except as admitted herein, the truth of the facts stated in said paragraph is denied.

3. Plaintiff admits the truth of the facts stated in paragraph 3."

Paragraph 3 of the notice reads:

"3. The motion picture industry has developed under the existence of clearance and runs. It is by such a system, with initially large receipts from prior run exhibitions and successive reduction of license charges, that satisfactory revenue can be derived by the producers and distributors, so that costly feature pictures can be made available to the whole public at varying admission prices.

4. In response to paragraph 4, plaintiff admits that *ib* [fol. 4617] each competitive area, under normal business conditions of free competition, each distributor desires to license its films for successive runs in such area under such clearance terms as will yield the maximum total license revenue from the area. In determining which theatres shall have which runs, its past business relations with the theatre, the skill and character of its management, its size, location, equipment and drawing power are all factors which, among others, may influence such a decision. Except as admitted herein, the truth of the facts stated in said paragraph 4 is denied.

11. Plaintiff admits the truth of the facts stated in paragraph 11."

Paragraph 11 of the notice reads:

"11. Of the so-called Schine Theatres, approximately 60 per cent are located in cities or villages with populations under 10,000, and approximately 87 per cent are located in cities or villages with population under 25,000.

23. Plaintiff admits the truth of *of* the facts stated in [fol. 4618] the first two sentences of paragraph 23. Plaintiff denies the truth of the facts stated in the last sentence of paragraph 23."

The first two sentences of paragraph 23 of the notice reads:

"23. Motion pictures are works of art and are the subject of copyright. They have no uniform or market value, and

the revenue which the owner of a copyright can derive from any picture or group of pictures depends upon the ability of the distributor to market them in different situations to the best advantage."

The Court: That is the admission in that paragraph?

Mr. McClennen: That is the admission in that paragraph. [fol. 4619] The Court: With these admissions in mind, considerable of the testimony has been repetitious, has it not? It does no harm, perhaps. These facts are already testified to, are they not?

Mr. McClennen: A great deal of it is not the matter of controversy, as these admissions indicate. My next witness, if your Honor please, was promised before 12:30, but he is coming from a distance.

The Court: He is not here now?

Mr. McClennen: He is not here at the moment.

The Court: You have no one here?

Mr. McClennen: I have no one here. He is the only witness now in contemplation.

The Court: I am prepared to run on Saturday, if it will help conclude the rebuttal testimony.

Mr. Wright: Now I feel that if the defendants conclude today we probably ought to be able to finish up tomorrow, without using any Saturday session.

The Court: Assuming that we do conclude in a day or two can we discuss now the question of the subsequent proceedings?

Mr. McClennen: If the testimony is concluded on Friday [fol. 4620] would your Honor consent to sit Saturday morning and go on with the argument?

The Court: I would not want to do it that way. I want to have it submitted on briefs, and an argument on the briefs.

Mr. McClennen: Does your Honor mean not to hear oral argument at all?

The Court: No, I will hear oral argument on the briefs, when we have got the matters in front of us. I mean you can argue it on the briefs as you would an appeal perhaps. I think in a case of this size we ought to follow that plan. I think it is really surplusage to have an oral argument and then some time afterwards furnish briefs. The Court gets a better understanding of it by argument on the briefs.

Mr. McClennen: What I had in mind with reference to the matter of the briefs, before your Honor spoke, was that it will be a very great amount of wastage if we go into the matter on briefs before knowing what the plaintiff is intending to rely upon. That is, to anticipate many things that will not be brought home.

[fol. 4621] The Court: He will serve his brief on you and you may serve your brief, and then a reply brief furnished.

Mr. McClennen: Could it be so that we could have the plaintiff's brief and then serve our brief and then the plaintiff a reply brief?

The Court: I think that is a fair way to do it.

Mr. Wright: I think that would be agreeable to us, your Honor.

The Court: I think we had better handle it that way and get all the points presented and considered. If you argue it now and then submit briefs afterwards it would be a waste of time. How long a time would you want? When your briefs are in I could hear you at any time.

Mr. Wright: I should think we would want 30 days, and I was going to suggest that perhaps your Honor, with the brief, would want us to submit proposed findings of fact and conclusions of law, and then I suppose Counsel, with their brief, would also submit their proposed findings and conclusions.

The Court: I think it could be done in a reasonably short time.

[fol. 4622] Mr. McClennen: With the plaintiff's brief to be served by December 10th?

Mr. Wright: Yes.

Mr. McClennen: And then may we have 30 days in which to prepare ours?

The Court: Is that satisfactory?

Mr. Wright: I should think so.

The Court: And your reply could be served when?

Mr. Wright: Fifteen days for a reply.

Mr. McClennen: Of course if we can get our brief ready shorter than the 30 days the 15 days can begin to run on the reply then.

The Court: Do it as rapidly as you can. I think that is a more satisfactory way for the Court.

We will recess now until 2 o'clock.

(Whereupon a recess was taken until 2 o'clock P.M.)

[fol. 4623] After Recess, 2 P.M.

Appearances: Same as before noted.

HOBERT L. HIMES, a witness called by and on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. McClennen:

Q. What is your residence?

A. Canandaigua, New York.

Q. You are a member of the Bar, practicing law, with offices in Canandaigua?

A. Yes, sir.

Q. And you have been in practice there since when?

A. About 1938, in the spring.

Q. And prior to that you were practicing in Buffalo?

A. Yes, sir.

Q. Your wife is the sister of J. W. Jenkins, Jr.?

A. That is right.

Q. And were they the two persons interested in the Jenkins Block, inherited from their father?

A. Yes, sir. Their mother had a life use of it, I believe.

Q. In the spring of 1938 of what did that block consist as it then was?

[fol. 4624] A. Well, there was a men's store in the south portion or part of it. In the northern portion or part there was a ladies' store. On the second floor there were two offices, occupied, one was by Mr. Levy and one was by myself. On the third floor there was more or less of a store room. I think the Carpenter's Union had a meeting room on the third floor.

Q. This room occupied by yourself was your law office at that time?

A. It was.

Q. It has been in the evidence of Mr. Hubert Wallace, at page 2755, that in the spring of 1938 he had some conferences, either alone or with Mr. Anthony J. Lauer, at your home and possibly elsewhere in Canandaigua, I am not sure. Do you remember anything about the episode?

A. It seems to me I saw Mr. Wallace in Canandaigua. I definitely remember Mr. Lauer stopping at the house one

late afternoon or evening. I don't know Mr. Wallace as well as I know Mr. Lauer.

Q. At that time had there been any recent changes in that Jenkins Block?

Mr. Wright: Could we have the time fixed?

A. Do you mean the structural changes?

Q. Yes.

[fol. 4625] The Court: At what time?

Mr. Wallace: At the time of these talks with Mr. Wallace and Mr. Lauer.

Q. I will postpone the question to you as to the building. Have you any means of fixing the approximate date of your meetings with Mr. Lauer and Mr. Wallace?

A. No, sir, I have not.

[fol. 4626] Q. Going back I asked you with reference to whether there had been any changes made in the building within any recent time, or any improvements?

A. No. The building was altered by Mr. Jenkins, Sr., but at or around that time there were no changes there. You are talking about structural changes, I assume?

Q. Yes.

A. There were none.

Q. Have you recently looked at your old files in this matter?

A. Yes, sir, I did.

Q. Do you find any correspondence with Mr. Lauer on this subject?

A. Yes, sir.

Q. And what is the first in date that you have, by way of telegram or letter?

A. I have another file there. Whether there is any previous to this in there, I do not know. (A pause). May and June, 1938.

Q. When is the first letter or telegram addressed by you to Mr. Lauer or by him to you?

A. June 15, 1938 is a telegram I sent to Mr. Lauer.

Mr. McClennen: I offer that.

Mr. Wright: I don't believe he responded to the question, did he? Is this supposed to be the first correspondence [fol. 4627] between him and Lauer?

The Witness: He asked me my first communication to Mr. Lauer first, as I understand the question, and that I believe is the first that I have here or recall, that I know anything about. It was my first communication to him. There is a letter from him in here in May. I tried to answer that part of the question first.

(Thereupon copy of telegram dated June 15, 1938, from Hobart L. Himes to A. J. Lauer, Esq., referred to, was received in evidence and marked as Defendants' Exhibit D-174.)

Q. This telegram of June 15, 1938, from Hobart L. Himes to A. J. Lauer, Esq., says "Our final answer is no stop. Letter will follow". Have you the letter to which that refers?

A. Yes, sir, a copy of it.

Mr. McClennen: That is dated June 16, 1938. I offer that.

Mr. Wright: As to this letter, it is objected to on the ground that there isn't any showing that the original was not available, and also on the ground that it appears to be *be* immaterial and irrelevant in any event. It is a letter, I [fol. 4628] suppose, that Mr. Lauer could have been asked about when he was on the stand. He testified here as a witness.

Mr. McClennen: I first learned of the existence of this letter at 2 o'clock this afternoon, and, therefore, was not in a position to show it to Mr. Lauer when he was on the stand.

I press the offer. The matter is not one of communication to Mr. Lauer. It is one of action by this witness and the fact that he prepared such a carbon copy as this is just as significant as the original.

Q. Perhaps I might ask you: Did you mail the letter of which this is a copy to Mr. Lauer?

A. The letter was mailed. I don't know whether I mailed it or not—through the office.

Mr. McClennen: Before I press the letter further, if your Honor please,——

Q. Have you any letter from Mr. Lauer acknowledging receipt of this?

A. That is the 17th?

Q. This is the 16th.

A. I don't see that. That mentions the 17th letter.

[fol. 4629] Mr. McClennen: Before going to the next I will ask to have this letter that is in suspense, or this carbon copy of June 16, 1938, marked as Defendants' Exhibit 175 for identification.

(Thereupon the carbon copy of letter of June 16, 1938, referred to was marked as Defendants' Exhibit 175 for identification.)

Q. In the order of dates, what is the next letter after June 15th that you have?

A. I have a letter dated June 16th from Mr. Lauer.

Mr. McClennen: That I will offer in evidence.

(Thereupon the letter dated June 16th from Mr. Lauer referred to was received in evidence and marked Defendants' Exhibit D-176.)

Mr. McClennen: Exhibit D-176 is dated June 16, 1938, on the letter-head of A. J. Lauer, Inc., Rialto, Auburn, N. Y.

"Mr. Hobert L. Himes, Jenkins Bldg.,
Canandaigua, N. Y.

DEAR MR. HIMES: Thank you for your telegram of yesterday. In the absence of your letter which you stated would follow, I do not know what your final decision is regarding your refusal to rent the main floor and basement of the [fol. 4630] Jenkins Building. From my past experience I do know it is nothing unusual for owners of properties in small cities to recognize the importance of having presented to them a plan whereby a definite income is assumed from the property. The reason for this attitude is when a prospect becomes interested in renting the property the owner always feels it has a greater value than if the property were offered for rent or sale by the owner himself. I am putting you on the list as the seventh party who during the past four years refused to make a deal relieving them of the responsibility in the management of the property. Each and every one of them during the past year, including two parties this year, have come to me and asked me if it would be possible to close a deal for them. In other words, I make this prophecy, that you are making a terrific mistake and

while you may not give me the satisfaction of coming to me at some future date you will always remember this com-
[fol. 4631] munication, particularly so whereas you are not requested to spend any money for improvements.

In closing I wish to say I am not grieved excepting we have had promise after promise that a definite decision would be made before this date and we were held off to such a late date that it will be almost impossible to start making improvements for the fall and winter business unless the transaction is closed before July 1st.

We, of course, ask you to kindly keep this matter in confidence as to the nature of business we had in mind in opening the store.

With kindest regards to you and Mrs. Himes and Mr. Jenkins, I am,

Very truly yours, A. J. Lauer."

Q. Now, have you a letter from you, dated June 17, 1938?

A. Yes, sir, a copy (handing to Counsel).

Mr. McClennen: Will you mark that for identification?

(Thereupon carbon copy of letter, dated June 17, 1938,
[fol. 4632] Himes, referred to was marked as Defendants' Exhibit D-177 for identification.)

Mr. McClennen: I offer D-177 for identification, a letter from Mr. Himes to A. J. Lauer, June 17, 1938, a carbon copy.

Mr. Wright: I have the same objection to this letter as to the other.

Mr. McClennen: Before pressing the offer I will go to this:

Q. Did you receive a letter of June 23, 1938, from A. J. Lauer to you?

A. Yes, sir.

Mr. McClennen: I will offer that.

Mr. Wright: No objection.

(Thereupon the letter of June 23, 1938, Lauer to Himes, referred to was received in evidence and marked Defendants' Exhibit D-178.)

Mr. McClennen: Exhibit D-178 is June 23, 1938:

"Mr. Hobert L. Himes,
90 S. Main St.,
Canandaigua, N. Y.

DEAR MR. HIMES:

Thank you for your letter of June 17th. Will you state definitely what your lease terms will be, expecting of course [fol. 4633] that they are within reason and fairness to all parties concerned. With best wishes to you and Mrs. Himes, I am,

Very truly yours, A. J. Lauer."

Q. Now, Mr. Himes, other than these letters appearing in your file, in carbon copy form, Exhibit D-175, June 16, 1938, and D-177, June 17, 1938, do you find in your files any indication that you wrote any other letter to Mr. Lauer of those dates?

A. No, sir.

Mr. McClennen: I press the offer in evidence of identification D-175 and D-177, if your Honor please.

The Court: Copies of letters by the witness to Mr. Lauer?

Mr. McClennen: Yes.

The Court: Is that objected to, Mr. Wright?

Mr. Wright: This letter of the 17th is clearly referred to in D-178. That would indicate, I suppose, that that was received. I do not see any reference in any of these letters in evidence to the one marked D-175. As to D-175 I think our objection would be the same.

Mr. McClennen: May D-177 be marked, then, if your Honor please?

The Court: Do you have an objection?

[fol. 4634] Mr. Wright: I assume from the fact that D-178 refers to it that it was received and I withdraw any objection based on the ground that it is not the original. Of course the relevance of any of this material has not yet been made clear to me. Of course we have a general objection on the ground of relevancy.

The Court: I will overrule your objection, then, if that is the only ground.

Mr. Wright: I withdraw the objection as to not being an original.

Mr. McClennen: Mark D-177 in evidence.

(Thereupon the letter of June 17, 1938, carbon copy, Himes to Lauer, previously marked as Defendants' Exhibit D-177 for identification was received in evidence.)

Mr. McClenhen: It reads: "June 17, 1938. A. J. Lauer, Esq., 1 South Street, Auburn, N. Y.

Dear Mr. Lauer: Our letters must have crossed in the mail. In any event, I thank you for your letter of the 16th inst., which arrived this morning, and have carefully noted its contents. No, I do not think our property is any more [fol. 4635] valuable than before. I certainly want you to feel free to call on me at any time, as I want to be able to contact you. If we have made a mistake it probably will not be the first one and no doubt not the last. Our discussions will be kept in confidence.

Wishing you and Mr. Wallace continued success, I am,

Yours very truly."

It has the initials "H. L. H." as the dictator.

[fol. 4636] If your Honor please, in view of the fact that Exhibit D-178, June 23, 1938, acknowledges the receipt of Exhibit D-177 of June 17, 1938, which contains the assertion, "Our letters must have crossed in the mail", and the fact that there is no comment in D-178 to the contrary of that, I re-urge the admission of Exhibit D-175, the one of June 15, 1938.

Mr. Wright: We object to it. I don't think it is apparent from the——

The Court: Sustained.

Q. Calling your attention and asking you to refresh your recollection from the exhibit for identification D-175, I will ask you if this was an accurate statement of your attitude, namely "Under all the circumstances I felt and still feel that your offer was not sufficient——"

Mr. Wright: We have an objection here.

The Court: Yes.

Mr. Wright: At the time that Mr. Lauer and Mr. Wallace were on the stand, as I recall, they were not permitted to go into the conversations had with Mr. Jenkins or Mr. Himes with reference to the property, and I don't suppose it is proper.

[fol. 4637] The Court: He is not asking for the conversation now, he is asking now for the truth——

Mr. Wright: Yes.

The Court: If that is what was said that is another question.

Mr. Wright: It is simply another way of——

The Court: I agree with you.

Q. Have you any memorandum in your files in your handwriting indicating the terms of the offer to which this correspondence related?

A. Yes, sir.

Mr. McClennen: I will ask to have that marked for identification.

(Thereupon memorandum referred to was marked as Defendants' Exhibit D-179 for identification.)

Mr. McClennen: I will offer D-179 in evidence.

Mr. Wright: Well, there isn't any foundation laid at all for the admission of this, nor does it show when it was made, who made it, who prepared it, any of the facts, any one would want to know before it is received in evidence.

The Court: Do you object?

Mr. Wright: Yes.

[fol. 4638] The Court: Sustained.

Q. Can you tell me whether the offer referred to in the memorandum marked for identification as Defendant's Exhibit D-179 is the offer referred to in the telegram, Exhibit D-174 saying, June 15th, "Our final answer is no"?

A. I have no present recollection, sir, as to the date of that. The offer says "The last offer" in my minutes, and in my memorandum.

Q. Having before you this correspondence of June 15th to June 23rd, 1938, and your memorandum identification Exhibit D-179, will you tell us as refreshed by that memorandum as best you can what Mr. Lauer or Mr. Wallace or both had said to you as the offer which they made?

Mr. Wright: That is objected to, if the Court please, they weren't permitted to testify to that on their examination. I do not see what possible purpose is being served here by asking this witness to go into conversations which were not gone into in the plaintiff's case.

The Court: Well, of course, the question as formed is objectionable. Whether or not he can state his recollection now what the conversation was about an offer; I understand [fol. 4639] you to say that the question as asked about it was objected to and the objection to it was sustained.

Mr. Wright: My recollection is that neither questions asked I believe of Mr. Lauer or Mr. Wallace while they are on the stand with respect to negotiations on this Flannigan property—all they were permitted to do was state that they did have conversations with these gentlemen with respect to the property, and that my recollection is they were not permitted to state what the conversations, if any, were. (A pause.) Somebody has gone down to get the transcript so I can see what it is.

The Court: Yes. Isn't the question here, Mr. McClennen, of what the negotiations were or whether there were negotiations?

Mr. McClennen: I am leading up to the question why they did not accept this offer.

The Court: You were examining the record there. What did you find?

Mr. McClennen: I find nothing in my brief notes of Mr. Lauer to indicate that there was any exclusion of any con- [fol. 4640] versation or terms of offer. It is contained in pages 2556 to 2568.

The Court: Is that testimony to the effect that they did negotiate with Mr. Himes or the Jenkins' interest?

Mr. McClennen: The testimony is to the effect they negotiated relative to the rental of a store owned by Jenkins. That is at page 2557. Then there was identified plans of a proposed theatre and then a telegram of May 10, 1938 from Mr. Jenkins to Mr. Lauer and that was offered and excluded at that time; then there was a copy of the Canandaigua Daily Messenger of May 10, 1938, at page 2561, and that was excluded, and then there was an offer of the plans prepared by an architect and that was excluded. I find no indication——

The Court: There was proof that the plans had been drawn. That was excluded because there was proof that plans had been made.

Mr. McClennen: There was no exclusion of the terms of the offer or any inquiry.

The Court: Are you asking this witness for conversations where you are seeking to establish what the contents

[fol. 4641] of that letter from Mr. Himes to Mr. Lauer is?

Mr. McClennen: No, I am seeking to show to the best of this witness' recollection what the terms were that he was dealing with.

The Court: That calls for conversation, what his talk was in the presence of Lauer.

Mr. McClennen: That is what I was just asking.

The Court: You are seeking to establish by parol what the letter June 16th to Mr. Lauer shows.

Mr. McClennen: No. I was asking to refresh his recollection from that letter, and to state what the conversations were.

The Court: He does not need to refresh his recollection at all. Ask him the question first.

Mr. Wright: I just wanted to call your Honor's attention to what I had reference to while Mr. Lauer was on the stand. He was asked by Mr. Kallis: "Q. After your discussion with Mr. Jenkins, Mr. Lauer, can you tell the Court whether a deal was definitely agreed upon?

Mr. McClennen: That is objected to.

The Court: Sustained.

[fol. 4642] Q. Do you have in your possession any figures which were the subject of discussion?

A. I have a memorandum which I have with me which was rather a—on which we discussed with Mr. Jenkins the arrangements for a lease of the property.

Mr. McClennen: Just a moment, that fully answers the question.

Mr. Kallis: All right.

Q. Did you and Mr. Wallace make a proposition to Mr. Jenkins?

A. We did.

Mr. McClennen: That is objected to.

Mr. Kallis: The question can be answered 'Yes' or 'No,' if the Court please, and doesn't do these defendants any harm, 'Yes' or 'No'.

Mr. McClennen: I quite agree that the answer will not do the defendants any harm, but I object to the question.

Mr. Kallis: It is a preliminary to something that follows, whether they made a proposition to Mr. Jenkins. I did not [fol. 4643] ask him what the terms of the proposition were.

The Court: I will let him state whether they made a proposition."

The Court: The question was objected to and my ruling was upon the ground that they were calling for conclusions of the witness.

Mr. Wright: My impression was that they were all your Honor was permitting him to do was simply to state whether or not a proposition was made without going into the terms of the offer.

The Court: I don't think you follow the conversations right through. My questions were from the standpoint, the ruling was upon the ground that it called for a conclusion, whether they made a deal. That was the point.

Mr. Wright: The final decision of your Honor was this statement: "I will let him state whether they made a proposition," and the answer was "We did." I assume that represented the limits to the extent your Honor wanted him to go and he couldn't state the conversation, all he could state was the ultimate fact whether or not they made a proposition. That is the way I interpreted it at the [fol. 4644] time.

The Court: I don't think you need to ask him.

Mr. Wright: As far as I can find out here, I don't see any testimony by Mr. Lauer as to conversations with this witness.

The Court: Even though there were not such conversations——

Mr. Wright: I assume the purpose in offering it is to reply to, or contradict something that the plaintiff established.

The Court: It relates to the whole subject matter and not some specific question.

Mr. Wright: So far it does not appear what, if any, connection he had with the Jenkins negotiations. I suppose that ought to be brought out in order to lay a proper foundation for what Mr. McClennen says he is going to do.

The Court: It does appear from this communication he did have some communication.

Mr. Wright: That he had some further negotiations with Mr. Lauer apparently occurring after the negotiations Mr. Lauer states he had with Jenkins.

The Court: I will let him state what was said by Jenkins [fol. 4645] with Lauer or Wallace, what was said about this subject about leasing this property.

Mr. McClennen: Before putting the question, if your Honor please, I referred to Mr. Wallace on cross-examination at page 3067, which I have briefly noted—I haven't the testimony here—that William Jenkins, the son, and Mrs. Himes, the daughter, he assumed to be the ones interested in the estate, Mr. Himes was a lawyer, such negotiations as he had were with the son and with Mr. Himes. That is at page 3067.

Mr. Wright: There hasn't been any testimony by this witness as to what negotiations he had with Mr. Wallace at all so far.

Mr. McClennen: No, there has been obvious reasons why there haven't been because you have been objecting to my showing.

[fol. 4646] Q. Let me preface it: Up to within the last few days have you had any occasion to think of this matter in six years?

A. Yes.

Q. Well, when did you have occasion to think of it?

A. Mr. Lauer—I don't mean Mr. Lauer. Mr. Wallace, the gentleman over there, Mr. Kallis, I think, stopped in my office perhaps two months ago or thereabout.

The Court: The question is with reference to some document or his own knowledge?

Mr. McClennen: In putting the question, your Honor,——

The Court: Let us find out whether he did have a conversation. We do not know whether he needs to refresh his recollection by contact with somebody or from the documents.

Q. Will you tell us, as nearly as you can recall it, the conversations you had with Mr. Wallace and Mr. Lauer on this subject of a possible leasing of the Jenkins Block?

Mr. Wright: Can we have the date fixed here?

The Court: About when? State about when.

Q. First, what is the best you can do to fix the date?

A. That would be awfully hard. I remember seeing Mr. Lauer once. It seems to me it was the afternoon, as I said—the late afternoon or evening at the house. I don't think Mr. Wallace was there. I think Mr. Lauer was over more [fol. 4647] than once. Yes, he was over more than twice, I would say, from this memorandum that I have. I have

no recollection of how many times, other than that, or without that. And I know that Mr. Lauer and Mr. Wallace were there at the time this last proposition, as I call it, was discussed. It is around—I would have to guess—in May or June, 1938, this last proposition.

The Court: You can fix the year, at least, by the telegram?

The Witness: That is right.

The Court: About May or June.

By Mr. McClennen:

Q. Just when do you bear in mind that you moved your office to Canandaigua?

A. Around April, 1938.

Q. Then you would be certain that it was after that that you had this talk, would you not?

A. I couldn't say that, sir. Mr. Jenkins and Mr. Lauer and Mr. Wallace, so they stated, had been negotiating, and I knew that this matter was being discussed. Whether I saw Mr. Wallace or Mr. Lauer before I moved to Canandaigua I can't now remember. We went back frequently week-ends.

Q. Mr. Wallace has spoken of a conference at the house in Canandaigua. Was Mrs. Himes living in Canandaigua [fol. 4648] before you moved your office from Buffalo to Canandaigua?

A. No, we went to Canandiagua at the same time. I think it was April, the last part of April.

Q. With that as the best fixing of dates that you can give us, relate the conversations that you had with Mr. Lauer and Mr. Wallace, as best you can, and, so far as they related to terms proposed, what those terms were.

Mr. Wright: That is objected to, if the Court please.

The Court: I will let him answer. Go ahead.

A. Well, I couldn't tell you the terms until I looked at this memorandum I made.

The Court: You can use the memorandum to refresh your recollection.

A. I know they wanted to rent the Jenkins Block. My recollection is that they proposed to make some changes in the block itself. They made a proposition to pay so much

a year on a graduate scale, and then this memorandum that I have, in my own handwriting, says "Wallace and Lauer's last offer," rent for the first three years was to be $3,000, for the next three years it was to be $3,500 a year, and during the first five years of that there was to be paid in addition seven per cent of the gross; the next four years the rent was $4,000 a year and they wanted a privilege of renewal for ten years at $4,500 a year. That is the best [fol. 4649] I can trace it.

Q. Now, do you remember whether anything was said in conversation, ignoring for the moment what may have been said in the letters, was anything said in conversation, by you or Mrs. Himes or Mr. Jenkins, her brother, in your presence, with respect to that offer?

A. I would say that Mr. Lauer and Mr. Wallace were not present when Mr. Jenkins and my wife discussed this offer that I have just given you. They left it and they went on their way and the family talked it over after they had gone.

Q. Then, before you sent this telegram of June 15, 1938, "Our final answer is no", Exhibit D-174, there had been some conversation between you and Mrs. Himes and Mr. Jenkins with respect to this matter of whether you should or should not accept the offer?

A. That is right, yes, sir.

Q. In that conversation was anything said about the prospect of a new Schine theatre being built in town?

Mr. Wright: If the Court please, the conversations are objected to.

The Court: Sustained.

Q. What were the considerations which led you to conclude not to accept the offer?

Mr. Wright: If the Court please, that is objected to also. [fol. 4650] The Court: Same ruling. It calls for his conclusion.

Mr. McClennen: I offer to show, if your Honor please, if the witness were permitted to answer that he would testify that the rejection had nothing to do with any knowledge——

The Court: I will let you show if he had any knowledge of the activities on the part of Mr. Schine in Canandaigua.

Q. Did you have any knowledge of any activities on the part of Mr. Schine?

A. You mean at the time of this offer?

Q. At the time of this rejection of this offer.

A. Will you read that question again?

(Question read.)

A. I don't know how to answer that, sir.

The Court: It is very broad.

A. Yes, I realize what you probably mean.

Q. Did you have any knowledge at that time of a prospect of Mr. Schine's building or opening a new theatre in Canandaigua on the Flanigan lot?

A. I do not now recall, sir.

Q. Were any such activities, if there were any such, the cause of your rejecting the offer?

Mr. Wright: That is objected to, if the Court please.

The Court: Same ruling again. This letter is on that [fol. 4651] subject. You can call Mr. Lauer and find out if he received that letter.

Mr McClennen: This does not ask about the letter, if your Honor please.

The Court: I assume that letter has some reference to the reason why the offer was rejected.

Mr. McClennen: The rejection was by this telegram which is in evidence.

The Court: The reason for it.

Mr. McClennen: I am asking the witness that.

The Court: What I said was this: It seems to me it is hearsay for him to state the conversation between themselves about the reason why it was rejected. As I said before, this letter written to Mr. Lauer, dated June 16, shows the reason for the rejection. You can call Mr. Lauer and see if he received this letter.

Mr. McClennen: If your Honor please, we, of course, are not trying the question of any conflicts between Mr. Lauer and this witness. What we are seeking to show is that this witness, in rejecting the offer, was actuated by considerations other than any prospect of a Schine theatre on the [fol. 4652] Flanigan lot in Canandaigua.

Mr. Wright: There is not any showing yet, your Honor, that this witness had any interest in that property other than the fact that his wife was a part owner. He is not the one whose testimony would be conclusive as to the issue of

why the offer was rejected in any event. There is nothing to show that he had any other connection with it than the fact that he sat in on some of the negotiations and that his wife was a half-owner. That is the way the record stands now.

The Court: As I say, it is hearsay testimony. I will let him state whether he had any knowledge that the Schine interests were negotiating for the Flanigan property at that time. That is a little different from the question as put by you. I think the witness has an interest——

Mr. McClennen: Will you read his Honor's suggested question and will you treat this as my question, Mr. Himes?

The Court: At the time you sent this telegram of rejection did you have any knowledge that the Schine interests [fol. 4653] were negotiating for the Flanigan property?

The Witness: Will you read that once more, please?

(Question read.)

The Witness: If the Court please, I wouldn't—living in Canandaigua, if this agitation was on the street I probably had some knowledge about it, some information.

The Court: In other words, you can't say?

The Witness: No, that wasn't my reason for what happened.

Mr. Wright: On the record as it stands, what his reason was is completely immaterial anyway. It was not his property.

The Court: Strike out that question and answer.

By Mr. McClennen:

Q. I will put the specific question: What was the reason for your sending this telegram of June 15, 1938, rejecting the offer?

Mr. Wright: That is objected to. It calls for a conclusion as to what a lot of people other than himself might have said or thought.

The Court: It seems fairly obvious from the testimony so far that in the telegram he is referring to the reasons as stated in the letter of June 16, to which the telegram [fol. 4654] referred. It says "Offer rejected, see my letter of such date". I think the better way is to prove that in writing.

Q. Observing your letter of June 16, 1938, and refreshing your recollection from it, will you state what your reason was for rejecting that offer?

Mr. Wright: That is objected to.

The Court: Sustained.

Mr. McClennen: I offer to show that the witness, if permitted to answer, would answer that it was because of the belief that it was not a desirable offer to accept and not because of any idea of the prospect of a new Schine theatre coming into town.

Mr. Wright: I submit if he gave that answer it would not be responsive to the question. The question that was asked him *if* what the reason was. He was not asked what was not the reason.

The Court: The question is what bearing has the motive of the proposed seller, so far as the sale is concerned? What materiality has that?

Mr. McClennen: I submit, if your Honor please, that wholly apart from any question of a new Schine theatre [fol. 4655] being projected for Canandaigua, this offer was rejected. Then it shows that there was no consequent effect from the proposal of a theatre there, if there was such a proposal made.

The Court: The answer to that is simply this, that there is nothing in the case to show that any activities of Schine in that direction were brought to their attention.

Mr. McClennen: That being so, it is very likely that the inference carries it far enough without my showing the actual facts, but I don't want to stop at that when the witness, who knows why he sent that telegram declining that offer is on the stand and could state what influenced him to send that, and that is the reason I offer it.

Mr. Wright: If the Court please, even on Counsel's statement, it could only go to the question of possible damages. This is not a damage suit. Even if Mr. Schine did not succeed in breaking off this deal, as the result of this false publicity about the activity on the Flanigan property, [fol. 4656] that whould in no way relieve the defendants of liability, the fact that the scheme was unnecessary or that the deal fell through that Wallace was trying to make, for some other reason. It could not possibly relieve the defendants from the consequences of that kind of act in any event.

Mr. McClennen: If your Honor please, we are trying a

case here in which it is contended that the activity of Schine had some effect upon interstate commerce at Canandaigua, and we are offering to show that it had no effect whatever, and we offer it on that ground.

The Court: The other objection as pointed out by the Counsel is that this witness has no interest in the matter and the question of what actuated him is not material. If it was competent at all it would be what actuated the owners of the property in rejecting the sale. So that it is incompetent for that reason as well.

Mr. McClennen: He was acting, if your Honor please, as husband and attorney in this transaction.

[fol. 4657] Mr. Wright: That has not yet appeared.

The Court: Objection sustained.

Q. Were you in these communications that have been put in acting as attorney in this matter?

A. Yes, sir.

Q. And in sending the telegram were you carrying out the decision which had been reached by the owners?

Mr. Wright: That calls for a conclusion and is objected to.

The Court: It seems to me it is immaterial. It already appears he was attorney, and he sent the telegram of rejection of the offer.

Mr. Wright: There is no question that he is an attorney. It does not appear yet who he was attorney for in this particular transaction.

The Court: He would have to be either attorney for the wife or the brother-in-law.

Mr. Wright: One or the other. And it does not appear which, if either.

The Court: Go ahead. You were acting as attorney for whom then?

The Witness: Well, for the Estate, your Honor.

The Court: The owners of the estate were who?

The Witness: Mr. Jenkins and my wife.

The Court: I will let him state whether this telegram [fol. 4658] was sent pursuant to instructions from its clients.

By Mr. McClennen:

Q. Is that the fact?

A. That is right. We discussed the matter and that was our answer.

Q. In that discussion was there stated the reasons why that offer should not be accepted?

Mr. Wright: That is objected to.

The Court: Sustained.

Mr. McClennen: I offer to show that if permitted to answer the witness would answer yes.

Q. Was that offer rejected because of any knowledge that the Schine organization was projecting a new theatre in Canandaigua?

Mr. Wright: That is objected to.

The Court: Whose knowledge, the witness's knowledge or the client's knowledge?

Mr. McClennen: This witness.

The Court: Objection sustained.

Mr. McClennen: I offer to show if the witness were permitted to answer he would answer no.

Q. I ask you what your belief was as to whether or not the offer was sufficient to warrant you in liquidating the Jenkins' Store, Inc., and making all the necessary [fol. 4659] changes?

Mr. Wright: It is perfectly obvious he did not want the offer or he would not have rejected it.

The Court: It is apparent that there was some reason.

Mr. McClennen: And all that I am concerned with is in showing that that reason was not any Schine project.

The Court: Of course if you say their sole concern was the financial effect upon the Estate that, of course, answers the questions that have heretofore been asked and objected to. I do not see that your question as you put it has any materiality in the form in which it was put, in the language in which it was put.

Mr. McClennen: Will you read the question?

(Question read.)

The Court: That is as I understood it before. Objection sustained.

Q. What was the Jenkins Store, Inc.?

A. The Jenkins Stores, Inc., was a corporation which I had incorporated to conduct a clothing business in this Jenkins Block in Canandaigua. There was a men's store in the south part and an archway through into a larger store [fol. 4660] which was a ladies' store, and the stock in that, if I correctly recall, 98 per cent of it was owned by Mr. Jenkins, Sr., and J. W. Jenkins, Jr., had one share and I think at one time I had one share.

Q. Was it or was it not your opinion that the offer under consideration when you rejected it by your telegram of June 15, 1938, was not sufficient to warrant the liquidation of that business and the making of all the necessary changes?

A. Will you read that, please?

(Question read.)

Mr. Wright: The same objection. It seems to me we have gone over this several times.

The Court: I think so, in another form. Objection sustained.

Mr. McClennen: I offer to show that if this witness were permitted to answer he would say that that was his opinion, and to make perfectly sure, if your Honor please, that I have put this matter in proper form, I ask you whether or not as attorney, in sending this telegram of June 15, 1938, Exhibit D-174, you were actuated in any way by any expectation or belief or apprehension that the Schine organization was proposing to put a new theatre on the Flanigan property in Canandaigua?

[fol. 4661] Mr. Wright: The same objection.

The Court: Objection sustained. He was sending this telegram, according to his instructions, as to whether this contract should be accepted or whether it should not. How he was actuated in sending the telegram is not material in any way that I can see.

[fol. 4662] Mr. McClennen: I offer to show that the witness, if permitted to answer, would say that he was not actuated by any such considerations.

Cross-examination.

By Mr. Wright:

Q. Mr. Himes, do you do any legal work for any of the Schine companies?

A. No, sir.

Q. You had no retainers from any of them?

A. No, sir.

Q. When was it Mr. Jenkins, Sr., died?

A. I can't give you the exact date. It is probably 12, 15 years ago.

Q. And his heirs were your wife and Mr. J. W. Jenkins, Jr.?

A. That is right, and his wife, of course. Mrs. Jenkins survived him.

Q. And Mrs. Jenkins, Sr.?

A. That is right.

Q. Then there was an executor for the estate, was there?

A. Yes, J. W. Jenkins, Jr., and my wife were the executors.

Q. They were the executors?

A. That is right.

Q. You don't recall, you say, when it was the first offer that was made by Wallace or Isauer for the property?

[fol. 4663] A. I don't recall when the first offer was made?

Q. Yes.

A. No, I don't recall.

Q. You knew there were some negotiations with Mr. Jenkins, Jr., before you got into the picture?

A. Yes, sir.

Q. And do you remember when it was that you first found out about this telegram here that has been marked for identification as Exhibit 805?

A. I saw that today for the first time.

Q. As a matter of fact the time that went out weren't you told about that by Mr. Jenkins, Jr.?

A. I couldn't say as to that, sir. Mr. Jenkins, Jr., was then up at the Armstrong Chemical Company. He moved out of the store, and I have no recollection about that, sir.

Q. Just think. Would you say that he didn't tell you at that time that he sent that telegram?

A. Oh, no, I wouldn't say he didn't tell me about that. I wouldn't say that.

Q. You just don't recall.

A. No, I don't recall.

Q. You don't recall what, if any, negotiations there were prior to the time that telegram was sent?

A. Oh, yes, there were negotiations, sir.

[fol. 4664] Q. I say, you don't recall what they were, is that right?

A. No. As to figures you mean, dollars and cents on the lease?

Q. What the negotiations were; as I understand it, prior to that time they were with Mr. Jenkins, is that right?

A. That is right. I must have been in Canandaigua when that telegram was sent, according to the date of it. I was living in Canandaigua at that time. I have no recollection whether or not Mr. Jenkins talked with me about it or not.

Mr. Wright: We will offer this Exhibit 805 in evidence. It has been identified before as having been received by Lauer.

The Court: What does it say?

(Mr. Wright hands Exhibit 805 to the Court.)

The Court: Have you got copies?

Mr. Wright: He has had it.

Mr. McClennen: I object to the receipt of this, if your Honor please, at this time.

The Court: By whom was it identified?

Mr. Wright: That was identified by Mr. Lauer as having been received by him.

The Court: Overruled.

(Thereupon telegram dated May 10, 1938, Lauer to Jenkins, Jr., referred to was marked as Plaintiff's Exhibit 805 in evidence.)

[fol. 4665] Mr. Wright: That is all.

Redirect examination.

By Mr. McClennen:

Q. Can you tell us whether this last offer so noted on your memorandum, Defendants' Exhibit D-179 for identification was after this date of May 10, 1938, appearing on Plaintiff's Exhibit 805?

Mr. Wright: He has already said he did not know.

The Court: Just a minute. You can by reference to the date?

The Witness: I didn't know Mr. Jenkins sent this telegram. That is what I understood your question to be. My recollection the last offer here was after the telegram of May 10th, Exhibit 805 in evidence, and before my telegram to Mr. Lauer on June 15th.

Mr. McClennen: That is all.

The Court: Next witness.

Mr. McClennen: May we photostat these papers of Mr. Himes and substitute the photostats?

Mr. Wright: Yes.

Mr. McClennen: If you will leave them, Mr. Himes, we will send them back to you.

The Witness: I want a memorandum of what you have got.

[fol. 4666] Mr. McClennen: If your Honor please, I offer in evidence Defendants' Exhibit D-154 for identification, the Telegraph Forum of Bucyrus, Ohio, of September 6th, 1935, announcing that "Page Miss Glory" would play at the State Theatre in Bucyrus, Ohio, beginning Sunday, which would be September 8th, 1935, to which there is now attached a certificate by a bookkeeper of the Bucyrus Telegraph that this advertisement appears in the issue of that date.

Mr. Wright: We have no objection, except I think it appears from other and better evidence that the picture played.

The Court: Received.

Mr. Wright: It is purely cumulative.

The Court: What exhibit is that?

Mr. McClennen: This is Defendants' Exhibit D-154.

(Thereupon photostate of ths Telegraph Forum, dated September 6, 1935, previously marked as Defendants' Exhibit D-154 for identification, was received in evidence.)

Mr. McClennen: That concludes the evidence for the defense.

Mr. Wright: If we may have about five minutes, I think we could have a rebuttal witness.

[fol. 4667] The Court: All right, short recess.

(Short recess.)

Mr. Wright: Will you mark these for identification, please?

(Thereupon records starting the week January 3, 1938, through to December 27, 1938, *was* marked as Plaintiff's Exhibit 1001 for identification, and a tabulation of the records contained in the previous exhibit 1001, was marked as Plaintiff's Exhibit 1002 for identification.)

CECELIA H. KULAKOWSKI a witness called by and on behalf of the Plaintiff, having been first duly sworn, testified in rebuttal as follows:

Direct examination.

By Mr. Wright:

Q. Where do you live, Mrs. Kulakowski?
A. Auburn, New York.
Q. And what is your occupation?
A. Secretary and house manager for the Capitol Theatre.
Q. The Capitol Theatre in Auburn?
A. Yes, sir.
Q. How long have you held that position?
[fol. 4668] A. For ten years.
Q. And in performing your duties in that job, have you had occasion to keep a record of the feature pictures that played at the Capitol?
A. I have.
Q. And I will hand you these cards that are held together by string all marked as Plaintiff's Exhibit 1001 for identification, and ask you if those are records kept by you?
A. They are.
Q. And those are the records of the features and shorts that played the Capitol during what period?
A. From the week beginning January 3, 1938 through the week of December 27th, 1938.
Q. Have you from those records that you hold there prepared a tabulation of the feature pictures that played the Capitol during that period?
A. I have.
Q. And is that this tabulation that has been marked as Plaintiff's No. 1002 for identification?

A. Yes, this is it.

Q. And you know this to be an accurate tabulation of the data that appears in the record, Exhibit 1001?

A. Yes, sir.

Mr. Wright: I will offer the tabulation in evidence, [fol. 4669] Exhibit 1002.

Mr. McClennen: We object to this going in evidence rather than the original, but if we may take it and the cards overnight we can check them and see if it may be the exhibit.

The Court: Yes.

By Mr. Wright:

Q. Did you examine these records in order to determine whether there was any consecutive seven-day period in which more than four features played at the Capitol?

A. I have examined it and we never played more than the four.

Q. There was no seven-day period in which you played more than four features?

A. Never.

Mr. Wright: That is all.

Mr. McClennen: That is all.

Mr. Wright: Of course, we don't like to hold the witness overnight for examination. Could you let us know today?

Mr. McClennen: I think in the course of a very short time after court adjourns, we can make the check and notify you whether there is any occasion to ask any questions. If we find any variations or additions, we can probably agree.

[fol. 4670] The Court: The original records would show the whole thing.

Mr. Wright: He has the original record.

The Court: That is not in evidence?

Mr. Wright: No, that is right. For convenience I offered the tabulation, because the original records include shorts as well as features.

The Court: The other is marked for identification?

Mr. Wright: Yes.

Mr. McClennen: We will try to let you know as early this evening as we can.

The Court: No, can't you check that in a few minutes? Can't you check that right away? Have you any other evidence this afternoon, Mr. Wright?

Mr. Wright: No, we have no other witnesses. There is

one more question. It appears on the face of the tabulation there are 205 features.

The Court: The total?

Mr. Wright: Yes, the total.

The Court: You can check those now in a few minutes?

Mr. McClennen: I don't know how many minutes it will take. We can go right at it.

The Court: We have an hour yet, if that is all there [fol. 4671] is to be done this afternoon.

Mr. McClennen: Would your Honor recess then, and we will go ahead with the checking?

The Court: Yes. Do you have other witnesses in the morning?

Mr. Wright: It is questionable whether we will have any other witnesses or not. We may have no more witnesses. We probably will have some documents that we will offer, and that I think will finish up the rebuttal.

The Court: We will stand in recess.

(Short recess.)

[fol. 4672] Mr. McClennen: If the Court please, I wish to urge the objection to the introduction of Exhibit 1001 for identification, which has not been offered, because the schedule, Exhibit 1002 for identification, was proposed as an exhibit, and the grounds for our objection are these: That the exhibit is confined to the year 1938, whereas the testimony, which it would seem that it was offered to rebut, was for the years 1938 and 1939, beginning at page 4243 and going on to 4244, and it subsequently developing that Mr. Schine was speaking by report of what had been told him by his booking department. Your Honor, at page 4253, 4255 and covering all at page 4261, struck out all that testimony, so that there is none to rebut. We make these objections therefore to the admission of Exhibit for identification 1002 because no basis exists for its admission.

Mr. Wright: If the Court please, what Counsel says is correct as to the prior statements about 1938 and 1939 of [fol. 4673] Schine having been based upon the information gotten from the booking department, but in making your ruling your Honor limited it to striking only that information which he got from the booking department and letting the other stand. Here was the ruling at page 4253:

"I think the statements of the information from the booking department is hearsay. I believe it is hearsay, aside

from what he has personally observed. I think the balance of his testimony relative to information contained in the booking department is hearsay."

Then on page 4255 the Court states: "Well, of course, I don't think it should all be stricken out. I limit the portion which should be stricken out, both as to the direct and the cross-examination, the statements of the witness as to the number and type of showing of pictures for specific times at the other opposition theatre."

Then Mr. McClennen says: "Well, does your Honor include in that the testimony of the witness when he was at [fol. 4674] Auburn?

The Court: No, no, that is just the point. I don't include that. I leave that in. I made it specific. Well, as to that, in so far as it is shown to refer to information obtained from his booking department."

Then later on the witness made these statements, and this is what compelled us to bring in the rebuttal. At page 4260 there is a question by me:

"Let us see what you know about the policy at the Capitol. The information you got yourself you say you visited Auburn?

A. I visited Auburn.

Q. What were these occasions when you visited Auburn"——

The Court: Whose testimony are you reading from now?

Mr. Wright: This is Mr. Schine.

"Q. What were these occasions when you visited Auburn and you noticed the policy of the Capitol?

A. That was just when I happened to visit the theatres.

Q. Well, when?

[fol. 4675] "A. During the summer of '38 or the fall. I visited several times.

Q. Do you know when?

A. I couldn't give you the date, no.

Q. You don't know the times at all that your observation of the policy at the Capitol relates to, is that right?

A. I visit the Auburn several times a year but I can't give you the exact date as to when."

On the basis of that statement I thought it was clearly incumbent on us to show that he was not mistaken in testify-

ing from personal knowledge based on visits to Auburn during that period.

The Court: Specifically what did he state on personal knowledge?

Mr. Wright: He had previously stated that the Capitol at Auburn used six to—at one point he said about eight features a week and later he said six to eight and had used up all the product and that was why they had no pictures for the Jefferson. As I say, it went out as to what came from the booking department. After that ruling was made he [fol. 4676] reaffirmed that he had personal knowledge on these visits to Auburn in 1938. That is why I felt it incumbent to bring these records as to what actually played there in 1938.

[fol. 4677] Mr. McClennen: If your Honor please, in reading that testimony Mr. Wright stopped at the foot of page 4260, and the very next question:

"Q. You can't give us the times or what you saw on any particular occasion with reference to the Capitol, is that right?

A. Well, I couldn't give you an accurate, detailed statement."

"Mr. Wright: I renew my motion, your Honor.

"The Court: I rule, as I have indicated before, that I refuse to strike out the testimony with reference to his own personal knowledge to which he has testified as to the Capitol Theatre. The testimony is that he has some personal knowledge of what was done, but other than as to the specific number of pictures that may be stricken out as hearsay." And that concludes the matter.

The Court: As to the specific number of pictures, were there two answers there preceding that?

Mr. Wright: In his preceding testimony he has stated flatly and definitely that the Capitol Theatre used either [fol. 4678] six or eight pictures a week during the year 1938, as was stated from what information was obtained from the booking department, and then it appeared he insisted he knew some of it personally because he visited there, and that was the result of your Honor's ultimate ruling, which let stand——

The Court: Aside from the exhibits the witness testified they never used six or eight pictures in any one week.

Mr. Wright: Her testimony was with reference to this period. The testimony that she gave is a summary of this record. Of course, that fact appears in this record, Exhibit 1002, as to that period. If her testimony is regarded as competent without these supporting records——

The Court: She testified to that directly.

Mr. Wright: Then there is no need for these.

The Court: She has been with the Capitol there during that time. She testified directly on the fact on the number of pictures.

Read her testimony.

(Thereupon the reporter read from the direct-examina-
[fol. 4679] tion of the Witness Kulakowski, starting on page 4668, line 11 to page 4669, line 16.)

The Court: It is within her personal knowledge.

Mr. Wright: The testimony was based on the tabulation.

The Court: Ask her if she personally knew if that was so, that they never played more than four. I think it should be received, Mr. McClennen. It is admitted that is a copy of the records, of course, it is the secretary's evidence, the document or book itself is the best evidence, but, on the other ground, the objection would not be sustained.

Mr. McClennen: If your Honor please, so far as any personal knowledge as to the exemplified thing, here is exactly the way the testimony reads—in the first place, both the year 1938 and '39 were inquired of Mr. Schine, and this is only 1938.

The Court: All right.

Mr. McClennen: If your Honor please, I am endeavoring to lay before you the significance of your ruling. Now, when we get to page 4259, the question is as to the Jefferson
[fol. 4680] Theatre, his own, and then it reads down with reference to that:

"Q. Well, you don't know whether there was a time when you played five or six or seven features at the Jefferson?

A. We never played seven features.

Q. You might have played five or six?

A. I wouldn't want to testify to that.

Q. You don't know?

A. But I am testifying to the best of my knowledge and I believe it is quite accurate.

Q. It isn't as accurate as your booking records, is it?

A. Not absolutely, no.

Q. They would be the best evidence of what policy you pursued in each theatre with respect to the number of features and the time during which it was, is that right?

A. That would be accurate so there is no error on a single feature.

Q. Let us see what you know about the policy at the Capitol. The information you got yourself you say you [fol. 4681] visited Auburn?

A. I visited Auburn.

Q. What were these occasions when you visited Auburn and you noticed the policy of the Capitol?

A. That was just when I happened to visit the theatres.

Q. Well, when?

A. During the summer of '38 or the fall. I visited several times.

Q. Do you know when?

A. I couldn't give you the date, no.

Q. You don't know the times at all that your observation of the policy at the Capitol relates to, is that right?

A. I visit the Auburn several times a year but I can't give you the exact date as to when.

Q. You can't give us the times or what you saw on any particular occasion with reference to the Capitol, is that right?

A. Well, I couldn't give you an accurate, detailed statement.

Mr. Wright: I renew my motion, your Honor.

The Court: I rule, as I have indicated before, that I re- [fol. 4682] fuse to strike out the testimony with reference to his own personal knowledge, to which he has testified, as to the Capitol Theatre. The testimony is that he has some personal knowledge of what was done, but other than as to the specific number of pictures that may be stricken out as hearsay."

The Court: "Other than as to the specific number of pictures".

Mr. McClennen: If your Honor please, there is in the full, fair and accurate interpretation of your Honor's ruling, there does not remain in this testimony any such period of time as is presented in this exhibit.

The Court: Go back to the testimony as to the time and see what he testified to it. Read that portion of it.

Mr. McClennen: He testified, there is no question, to the

time of 1943 and 1944 judged by what he had got from his booking department, and he never testified to having seen any week in which there were three changes.

The Court: I want to see what he said, not what your [fol. 4683] statement of it is.

Mr. McClennen: Then, if your Honor will permit me, I [fol. 4684] will read it consecutively. That is the first time that I see any reference to his own visits. It is clearly shown to be on the information obtained from the booking records.

Mr. Wright: I beg your pardon. Some of it refers to what he said he saw in the newspapers. Page 4243 is where it originated.

Mr. McClennen: Page 4243 is where the subject opened with this answer:

"A. The Auburn opened in '38 and we found that playing in the Palace six pictures, in the new theatre three, and the Capitol absorbing about eight a week, took up all the pictures', do you remember saying that?"

(Mr. McClennen continues reading to and including line 14, page 4258)

The Court: Is this material to the objection, this part of the testimony?

Mr. McClennen: Yes, your Honor, your ruling comes after that.

(Mr. McClennen continues reading down to line 3, page 4261.)

[fol. 4685] Now, that ended the testimony of the witness, the end of the cross-examination.

The Court: Let me say this. I have your view about the matter. The ruling I think is clear. He did testify distinctly and definitely of times when he visited Auburn, he knew the Capitol Theatre was playing six pictures. That was definite, at a certain time. He did not testify generally to the number of pictures. That was stricken out as hearsay on the ground it was with reference to bookkeeping, but he did testify specifically as appears from what you have read there were times when he did visit Auburn and frequently, and saw and knew that the Capitol was showing six pictures, and the ruling is clear. From the ruling the differences were defined, as brought out. What was stricken out was

what he referred to as his knowledge from the bookkeeping. That, perhaps, is not very definite altogether, but then the question of the rebutting testimony could not have the same [fol. 4686] effect as though there were perhaps a more specific answer.

Mr. McClennen: If your Honor please, there is not an item on this schedule that is offered with slight exceptions that I refer to that conform to the record, there is not an item on there that indicates that at any of the times that Mr. Schine, himself, saw that theatre there was anything more than what he said, because his testimony is over a period of time. These visits and this schedule is confined to this year, and the records of the Capitol Theatre, itself, will show that in the periods following there were changes that would warrant this statement of a minimum of six changes a week, and this exhibit ought not to go in picked out from the whole period.

The Court: Well, let us see what period it was that was testified to by Mr. Schine.

Mr. Wright: As I read his testimony the only dates that he fixed for us on which he made visits to Auburn and observed the policy of the Capitol, was the year 1938.

The Court: Where does it say that?

Mr. Wright: At page 4260.

[fol. 4687] The Court: What does it say?

Mr. Wright: The question was, first:

"Q. What were these occasions when you visited Auburn and you noticed the policy of the Capitol?

A. That was just when I happened to visit the theatres.

Q. Well, when?

A. During the summer of '38 or the fall. I visited several times."

Then I asked and tried to fix it further in the year:

"Q. Do you know when?

A. I couldn't give you the date, no.

Q. You don't know the times at all that your observation of the policy at the Capitol relates to, is that right?"

The Court: You mean the specific time?

Mr. Wright: Yes. Then he said:

"A. I visited the Auburn several times a year but I can't give you the exact date as to when."

Then I said:

"Q. You can't give us the times or what you saw on any [fol. 4688] particular occasion with reference to the Capitol, is that right?

A. Well, I couldn't give you an accurate detailed statement."

I understand that all the testimony in the record that is left as to his personal observation relates to this year 1938. Now, if there is any contention that he has any testimony left in the record as to what the policy of the Capitol was, the number of pictures the Capitol used, we will bring in the record for the year after that and before, or any time he made a statement about it, because his statement was false as to any year.

Mr. McClennen: If your Honor please, it is perfectly obvious from the testimony as a whole that he was talking about a period after the Auburn opened and the Auburn didn't open until September of 1938.

The Court: Well, one question is specifically directed as to the year 1938. It says so.

Mr. McClennen: Here there is presented this list of the playings in the period from January to September, 1938, [fol. 4689] and nothing presented as to the period immediately following that in 1939.

Mr. Wright: I beg your pardon. This is January——

The Court: Beyond September.

Mr. Wright: —this is January '38. The last play date is January 2, 1939. It covers the entire one-year period.

Mr. McClennen: That is what I said.

Mr. Wright: You said September.

Mr. McClennen: I didn't say that was the whole of [illegible] I was pointing out to your Honor that they were offering these plays for a period to which Mr. Schine's testimony on personal visits there did not relate, because the Auburn Theatre did not open until September, 1938.

The Court: Excepting one remark in that statement, September, 1938, and there are three months left in '38, aren't there?

Mr. McClennen: Your Honor, I was speaking in an endeavor to give a fair and accurate picture if it was going to be a presentation of what the record showed, and calling to your attention that there is nothing in here of the

period immediately following this. That is in January, [fol. 4690] 1939, and we believe those records show that there were six pictures a week played in 1939.

The Court: Counsel said he is willing to admit it.

Mr. Wright: I want to know now whether there is any claim that there is competent evidence by Mr. Schine as to the fact that the Capitol was playing six to eight pictures a week in any year other than '38. If there is, I will bring in the records for that year. As I read the testimony the only year he fixed when he visited the Capitol and observed the policy of the Capitol was 1938. Counsel said he testified to another year, and if he will name the year or years, we will bring in competent records for each of those years.

Mr. McClennen: I submit that in what I have read is just that testimony, and I submit that by your Honor's ruling it is not in the record.

The Court: It is clear that he testified to something with reference to 1938. What was left in that record, as I read it, is the statement that on certain occasions, when he was there, he knew certain things being done at the Capitol, [fol. 4691] or what they were showing at the Capitol. That was what was left and that is what the Court intended to leave in the testimony.

Mr. McClennen: If your Honor please, on a normal interpretation of that testimony, I submit that there is nothing to indicate that he was in Auburn for any whole week in any period, or could have any personal knowledge of that playing that is referred to, and he had given his testimony of the information given him by his booking department, and that that is the only testimony that is in as to numbers played.

The Court: If that is the construction that takes all of it into consideration in connection with this exhibit proposed here. It may be considered, I think, in connection with the consideration of the whole testimony. In the aggregate it might have some force. As I stated repeatedly the record now stands that at some time he personally knew what was being done. Now that stands out, it seems to me, as a clear statement. Whether it was intended by him [fol. 4692] to mean knowledge from the bookings, or not, does not show.

Mr. McClennen: I respectfully urge your Honor that the testimony as it has been read as a whole contains no state-

ment of him that in any week did he personally observe the playing of six pictures in that theatre, and that the real substance of it was drawn from the booking department.

The Court: Mr. Schine can be recalled, and testify again.

Mr. McClennen: I am speaking, if your Honor please, about the admissibility of this record.

The Court: Of course, the copy is not admissible, if there is an objection to that, but a copy of the original records I think it is competent here to take in connection with the testimony of Schine.

Mr. McClennen: As to the checking we have checked the record and, with a few exception-, the schedule in this exhibit fairly sets out the record as the whole record would show and in summary form, and the exceptions which I make are as I have stated them, and not to the use of a table [fol. 4693] instead of the original record. If this is to go in I want to ask the witness some questions.

The Court: All right. Step forward.

Cecelia H. Kulakowski resumed as a witness by and on behalf of the Plaintiff, having been previously sworn, testified further in rebuttal, as follows:

Cross-examination.

By Mr. McClennen:

Q. Did you investigate the records to see what was being played at the Capitol Theatre immediately before the year 1938 and immediately after the year 1938?

A. No.

Q. You made this schedule on some direction as to what you should investigate, didn't you?

A. Yes.

Q. And you were told to make up a schedule from the record of 1938?

A. Because 1938——

Q. Not "because" but that is what you were told, was it?

A. That is the year that was in question.

Mr. McClennen: I will ask to have that stricken out.

[fol. 4694] Q. You were told, were you, to make up this schedule for 1938?

A. Yes, sir.

Q. And you did not look before or after that?

A. No, sir.

Q. Do you remember that in parts of the year 1939, the Capitol was playing three changes a week?

Mr. Wright: If the Court please, this is not cross-examination. If he wants to go into this, into other periods, I suppose we would then have the question of other records.

The Court: When we reach the question we will pass upon it.

Mr. Wright: I say I object to the question now. I want to point out it is not cross-examination. I object to it on that ground. I assume he makes the witness his for that purpose.

The Court: I will receive it. There might be some question as to the time Mr. Schine was testifying concerning.

Mr. Wright: I don't see how she can settle the question of what period Mr. Schine was testifying about.

The Court: No, I mean his question, the question asked [fol. 4695] by the counsel is covering more than the period, the year 1938.

Mr. Wright: I asked him to state a year, and his response was there was no testimony in the record that Mr. Schine gave testimony of personal knowledge as to any year.

The Court: Objection overruled.

Mr. McClennen: Will you read the question?

(Last question read.)

The Witness: I do not remember.

Q. You don't remember anything about that? Were your duties such that you were at the theatre?

A. I was all over the theatre. Mr. Wallace was there.

Q. You were what?

A. I was in and out of the theatre.

The Court: You were there every day?

The Witness: I was there every day.

The Court: So you would know what was showing?

The Witness: Yes, sir.

Mr. McClennen:

Q. You mean that you don't know whether the Capitol played three changes a week in 1939?

A. I can't recall offhand.

Q. You can't recall?

A. No, sir.

[fol. 4696] Q. Your records, of course, would show that?

A. Yes, sir.

Q. And does your recollection go so far as to enable you to say that at some times the Capitol played three changes a week?

A. I cannot answer that.

Q. You mean——

A. I don't remember.

Q. You don't ever remember when the Capitol played three changes a week?

A. Unless I look back into the records.

Q. What part of the bookkeeping do you do?

A. I do the regular bookkeeping work, enter the transactions as the confirmations come in. Mr. Wallace does the dating.

[fol. 4697] Q. Do you enter on your books of account the film rentals to be paid?

A. Yes, sir.

Q. And the number of pictures played per week in those film rental accounts?

A. Will you repeat that, please?

Q. And the number of pictures played per week in those film rental accounts?

A. From each company, from the company that we played during that week.

Q. And do you say that you never remember a single week in which the Capitol played three changes a week?

Mr. Wright: If the Court please, it is wholly immaterial what this witness remembers. She has records. The records can be produced for any year that the Counsel is interested in.

The Court: She has already answered that question. She says she has no record of any time that the features were played a week.

Mr. McClennen: I am not asking for the record now. I am asking if this witness, from her connection with the theatre, can answer that.

The Court: She has answered that question specifically. She said she did not remember.

[fol. 4698] By Mr. McClennen:

Q. That you don't remember of any week in which three changes were played in a week?

A. I do not remember off-hand.

Q. How quickly could you ascertain from your records about that?

A. I would have to go back to Auburn this evening.

Q. That is, you couldn't get the record here, by telephone or in some such way?

A. No, sir.

Q. Well, would you make that investigation and let us have the results tomorrow morning?

A. That is impossible to get it tomorrow morning because I have to go back to Auburn and I won't get in there until early in the morning.

Mr. McClennen: I will ask if your Honor will allow me to suspend the cross-examination of this witness——

The Court: I want to get through with this evidence today.

Mr. Wright: I will repeat what I said before, that if there is any claim that there is now testimony in this record by Mr. Schine that he observed six or eight pictures a week being played at the Capitol Theatre during any other year than 1938 we shall see that the records for that year [fol. 4699] are produced.

Mr. McClennen: We do not claim that there is any such testimony in the record as Mr. Wright has just stated.

The Court: You do not claim that his testimony related to any year other than 1938, you mean?

Mr. McClennen: I claim that his testimony did not go to the point of a personal observation of six changes a week at any time and that he did not distinguish between 1938 and 1939.

Mr. Wright: What possible purpose does this examination serve that he is now conducting?

Mr. McClennen: I have said that I believe that there is no testimony in this record of Mr. Schine's personal knowledge that six pictures played in any week. Now, if we are in accord on that then there is no need of this, but if it is contended otherwise, why, then, we ought to have this information.

The Court: I do not think it is necessary to go into that: I can read the testimony and draw my own conclusions. Counsel has offered to submit the records of 1939. It is [fol. 4700] your claim that Mr. Schine's testimony includes that year and could be so construed as to include that year.

Mr. McClennen: If your Honor please, I have endeavored to make perfectly clear my position, which is that Mr. Schine has not testified by personal knowledge to any time, but if I am wrong on that and he has testified of personal knowledge that there was any week in which there were six pictures played, that that is not confined to 1938, but that he is speaking of the period after the Auburn theatre opened.

The Court: What period? How long a period?

Mr. McClennen: An indefinite period. He mentions as far back as 1940 in one of his answers, but certainly not beginning until September, 1938, because he fixes this whole thing as the shortage of pictures that existed after the Auburn was opened, so that we have a beginning date but not an ending date.

The Court: You would not submit the records of 1939?

Mr. Wright: If your Honor rules that Mr. Schine's testi- [fol. 4701] mony from his personal knowledge as to what played at the Capitol may be construed as referring to 1939, 1940 or 1941, we will produce the records for all of those years.

The Court: Counsel says only up to 1940.

Mr. Wright: Do I understand that you mean 1939 or 1940? If there is any question about 1940 we ought to have the 1940 records here.

Mr. McClennen: Well, I do not think that we have checked the 1940 records enough to make any assertion concerning them, but I am speaking particularly of the 1939 records.

The Court: This witness will be excused. We will adjourn until tomorrow morning. As I said before, I will receive this transcript of the record showing the date, as I take it, that the pictures were played, as relating to the testimony of Mr. Schine. I do not know whether that will be construed by me, after reviewing the testimony, as showing that he is referring to booking records all the time or whether it is an absolute statement of his own personal knowledge. [fol. 4702] I will have to pass on that when considering all the evidence.

Mr. McClennen: While not seeking to intrude on your Honor's ruling I would like to have my objection in addition to the others specifically to the portion of this exhibit for identification 1002, which relates to a date before September, 1938, and specifically that it does not extend into 1939, both of those periods.

The Court: Counsel for the Government suggested that they would submit 1939.

Mr. Wright: As I read the testimony the only date——

The Court: Do not go over that again.

Mr. Wright: This means a trip by the witness back to Auburn and bringing these records. If your Honor has any doubt about my contention that the only date he fixed on which he had personal knowledge is 1938, then I will bring in 1936, 1937, 1939, 1940 and 1941, all that we have got.

The Court: Objection overruled. I will receive the exhibit.

(Thereupon the tabulation contained in Exhibit 1001 previously marked Plaintiffs' Exhibit 1002 for identification [fols. 4703-4705] was received in evidence.)

The Court: Is there anything further?

Mr. Wright: We have no further witnesses today. We may have some documentary evidence tomorrow. I think we ought to finish up tomorrow morning.

The Court: All right. We will adjourn until 10:30 tomorrow morning.

(Whereupon an adjournment was taken until tomorrow, Friday, November 10, 1944, at 10:30 o'clock A.M.)

[fol. 4706] UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

Civil 223

UNITED STATES OF AMERICA

vs.

SCHINE CHAIN THEATRES, INC., et al., Defendants

Continuation of trial before Honorable John Knight, United States District Judge for the Western District of New York, November 10, 1944, 10:30 o'clock A.M.

APPEARANCES:

Robert L. Wright, Esq., John F. Clagett, Esq., Harold L. Schilz, Esq., Philip Marcus, Esq., Special Assistants to the Attorney General, and Milton Kallis, Esq., Special Attorney in behalf of the United States.

Edward F. McClennen, Esq., Willard S. McKay, Esq., Saul E. Rogers, Esq., Arthur E. Whittemore, Esq., Arthur J. Homans, Esq., and Howard M. Antevil, Esq., appearing for the Defendants.

[fol. 4707] PROCEEDINGS

Mr. Wright: Will you give these the next three Plaintiff's numbers for identification?

(Thereupon the certified copy of meeting of Salamanca Common Counell Oct. 6, 1941, was marked as Plaintiff's Exhibit 1003 for identification.)

(Thereupon the agreement, dated Oct. 3, 1935, between B. F. Keith Corp. and Dominion Operating Co., Ltd., and Schine Chain Theatres, Inc., and S. K. E. Operating Corporation, Ltd., was marked as Plaintiff's Exhibit 1004 for identification.)

(Thereupon the agreement, dated July 31, 1939, between the same parties, was marked as Plaintiff's Exhibit 1005 for identification.)

Mr. McClennen: If your Honor please, we are in accord that on page 3562, line 13, "the" should read "two", and that on page 4153, line 12, after "honor" and before "by" a "not" should be inserted.

Mr. Wright: There are a number of corrections that I think will have to be made in the record. We are going to try to handle those by an exchange of letters within the next week or so.

We offer in evidence a document marked for identification [fol. 4708] as No. 1003, which is a certified copy of the meeting of the Salamanca Common Council, dated October 6, 1941, granting a permit to Schine Theatre Company to build a theatre.

Mr. McClennen: Pursuant to the plans and specifications on file in the City Clerk's office.

(Thereupon the certified copy of meeting of Salamanca Common Council, previously marked as Plaintiff's Exhibit 1003 for identification was received in evidence.)

Mr. Wright: We should also like to offer at this time an exhibit previously identified as Defendants' No. 45. That was an exhibit that was to be photostated. At the time that Mr. Schine was on the stand he recalled having received it. It is a letter from the people in the Masonic Lodge at Medina to Mr. Schine.

(Thereupon the letter, Defendants' Exhibit 45 for identification, was received in evidence and marked Plaintiff's Exhibit 1006.)

Mr. Wright: That, I think, concludes the rebuttal testimony. We have some other material here which consists of documents and which were not produced at the time we [fol. 4709] closed our case. Two of those are Exhibits 1004 and 1005 for identification, 1004 being the agreement dated October 3, 1935, between B. F. Keith Corporation, Dominion Operating Company, Ltd., and Schine Chain Theatres, Inc., and S. K. E. Operating Company, Ltd., Exhibit 1005 is an agreement, dated July 31, 1939, between the same parties. These were the agreements I believe referred to in Mr. Schine's examination, which we asked to have produced and which have been produced by the defendants, and we offer them in evidence.

Mr. McClennen: There is no objection to these, but it leaves the matter incomplete because the agreements refer to certain leases and without those leases there does not appear on the face of the papers the proportions of interest that have been testified to. I think it is quite immaterial so

long as you are not misled by not having all of the documents.

The Court: Do you want to produce the leases?

Mr. McClennen: I should suggest that they be appended as part of these exhibits.

Mr. Wright: The only reason why we have not offered the leases with these is simply that all the leases do, as Counsel suggested, show the proportion of interest and we [fol. 4710] feel that the oral testimony adequately covers that point. The leases are rather voluminous and I did not want to encumber the record with them unless there is some special point that Counsel has in mind.

Mr. McClennen: Mr. Wright's suggestion covers all that I had in mind. If you read these papers alone they would not seem to support the oral testimony, but if the oral testimony is to be undisputed in respect to these proportions then we do not need the leases.

Mr. Wright: I might say in that connection that this exhibit 1004 refers to a letter agreement, dated August 21, 1935, which this Exhibit 1004 cancels, and that agreement I believe was not produced and was not available.

Mr. McClennen: You do not care for it?

Mr. Wright: It might be said also that that agreement might be necessary to a full understanding of 1004 and I would be glad to offer it also, if it is available, but I was informed that it was not available.

[fol. 4711] Mr. McClennen: I am told that was just a preliminary agreement that was merged into this one that you have put in. It may be understood that we may substitute photostats for these originals?

Mr. Wright: Yes.

(Thereupon the agreement, dated Oct. 3, 1935, between Keith, et al., and S.K.E. Operating Co., Ltd., previously marked Plaintiff's Exhibit 1004 for identification, was received in evidence.)

(Thereupon the agreement, dated July 31, 1939, same parties, previously marked Plaintiff's Exhibit 1005 for identification, was received in evidence.)

(Thereupon letter from Mr. Morgan of Paramount to Mr. Marcus, dated October 26, 1944, referred to, was marked as Plaintiff's Exhibit 1007 for identification.)

(Thereupon the agreement, dated November 6, 1941, was marked as Plaintiff's Exhibit 1008 for identification.)

Mr. Wright: I have had marked for identification as Exhibit 1007 a letter from Mr. Morgan of Paramount to Mr. Marcus, dated October 26, 1944, which shows the play-off of Paramount features for 1939-1949 in Salisbury, Mary- [fol. 4712] land, showing the title of each picture, the exhibitor that played it, and the dates on which he played it.

(Thereupon letter, dated October 26, 1944, previously marked as Plaintiff's Exhibit 1007 for identification was received in evidence.)

Mr. Wright: Then we had marked as Exhibit 1008 for identification an agreement, dated November 6, 1941, between Henry and Rebecca Pohl, of Norwalk, Ohio, and the Norwalk Theatre Corporation, which covers, I believe, the premises formerly occupied by the Forum Theatre, which we offer in evidence under the same number.

(Thereupon the agreement, dated November 6, 1941, previously marked as Plaintiff's Exhibit 1008, was received in evidence.)

Mr. Wright: Then we have here a photostatic copy of the license contract between Fox and the Kallet Theatres, Inc., for the Regent Theatre at Syracuse, which has been produced pursuant to our subpoena as the contract under which the group of five pictures, headed by "Charley's [fol. 4713] Aunt", played the Regent Theatre. At the time the other Syracuse contracts relating to those same five pictures were offered a number was left for this contract, which was No. 979, and I will ask to have this marked and received in evidence as Exhibit 979.

(The photostatic copy of license contract between Fox and Kallet Theatres, Inc., referred to, was received in evidence as Plaintiff's Exhibit 979.)

Mr. McClennen: The date of Exhibit 979 is August 8, 1940.

Mr. Wright: Then we have material here, which was previously identified, but which was not offered at the time we closed our case, through inadvertence. That is, these two contracts with Columbia, which were marked for identification as Exhibits 750 and 751, between Columbia

and the theatres operated by the witness Fenyvessy at Rochester.

The Court: What theatre?

Mr. Wright: 750 is for the Monroe and 751 is for the Madison. They are both second-run contracts. The Madi-
[fol. 4714] son contract is for 1936-1937 and the Monroe is for 1937-1938. We offered, I believe, all of the identified material in respect to those theatres.

Mr. McClennen: Exhibit 750 is dated "Approved June 18, 1937," for the Monroe for Group A 4, 5 and 6, and Exhibit 751 for the Madison is dated "Approved November 2, 1936" for Group W 4, 5 and 6.

The Court: For what years, the balance of one year?

Mr. Wright: 751 refers to the pictures released during the period beginning September 1, 1936, and ending September 30, 1937, and 750 refers to the period commencing Sept. 1, 1937, and ending September 30, 1938. It appears that 751 is for the 1936-1937 season and 750 for the 1937-1938 season.

Mr. McClennen: I am told that these two contracts are already in evidence under those numbers. It is simply a matter of their not having been checked on the face of the contracts by the number on page 2247.

Mr. Wright: In any event, they may be so marked now.

[fol. 4715] (Thereupon the license agreement, Columbia Pictures Corporation with Fenyvessy, previously marked as Plaintiff's Exhibit 750 for identification was received in evidence.)

(Thereupon the license agreement, Columbia Pictures Corporation with Fenyvessy, Madison Theatre, 1936-37, previously marked as Plaintiff's Exhibit 751 for identification was received in evidence.)

Mr. Wright: Then we also have some RKO material, which was previously identified, but which I do not believe has been offered and marked in evidence. We would now like to offer Exhibit 520 for identification as an agreement dated September 22, 1933, between Schine Theatrical Co. and its subsidiaries and RKO Distributing Corporation, whereby it is agreed that on the deal signed for the 1933-1934 pictures the following clauses are to become part and parcel of the deal and the approval of the contract will be an automatic approval of this letter. Exhibit 524 is a simi-

lar agreement, dated October 29, 1934, between Schine Theatrical Co., Inc., and its subsidiaries and RKO Distributing Corporation, and which refers to the deal for the [fol. 4716] 1934-1935 pictures.

Mr. McClennen: On Exhibit 520 against paragraph seven there is in pencil "Only in Buffalo and Albany territory." This is not an original paper but simply has typed signatures on it.

Mr. Wright: That is right. These are mimeographed copies produced from the files of RKO.

(Thereupon the agreement, dated September 22, 1933, between Schine Theatrical Co. and RKO, previously marked as Plaintiff's Exhibit 520 for identification, was received in evidence.)

(Thereupon the agreement, dated October 29, 1934, between Schine Theatrical Co., Inc. and RKO, previously marked as Plaintiff's Exhibit 524 for identification, was received in evidence.)

Mr. Wright: Then we have these photostatic copies of RKO contracts, all of which were identified as part of the folder marked for identification as 628. They all relate to Corning, New York, and the seasons 1933-1934 and 1934-1935. We had offered material in respect to Corning for, I believe, Universal, Fox, Loew's, Paramount, Warner, and these should have been offered at that time.

I will ask to have marked as 628-A the contract with [fol. 4717] the application date October 23, 1933, between Schine and RKO for first-run Corning, 1933-1934 productions.

628-B is the application, dated August 19, 1933, between Fred Gerber and RKO for second-run, Corning, 1933-1934 features.

628-C is the application, dated February 19, 1934, between Gaby & Cohen for third-run, Corning, 1933-1934 features.

628-D is the contract application date October 31, 1934, between Schine and RKO for first-run, Corning, for the 1934-1935 season.

628-E is the contract application date October 31, 1934, between Schine and RKO for second-run Corning, 1934-1935 features.

628-F will be the contract application date April 15, 1935, between Gaby and RKO for third-run, Corning, on 1934-1935 features.

[fol. 4718] (The contract applications referred to, dated August 19, 1933, February 19, 1934, October 31, 1934, October 31, 1934, and April 15, 1935, were received in evidence and marked Plaintiff's Exhibits 828-A, B, C, D, E and F, respectively.)

Mr. Wright: It is stipulated that the picture "Charley's Aunt" played first-run in Syracuse at the Keith Theatre from August 14th to 20th, 1941, and then at the Eckel from August 21 to 27, the same year. "Wild Geese Calling" played at the Paramount September 3rd through 9th, 1941. "Private Nurse" played the Paramount August 20th through 26th, 1941. "Dressed to Kill" played the Paramount August 27th through September 2nd, 1941.

All of those dates I have read are for first-run Syracuse.

"Sun Valley Serenade" played at Keith's, first-run Syracuse from September 18 through 24, 1941, and with it was played a feature called "Three Sons of Guns", during the same period.

Then "Sun Valley Serenade" played the Eckel from [fol. 4719] September 25 through October 1, 1941, with "They Meet Again" as the second feature during the same period, and "Hurry, Charlie, Hurry" played the Eckel October 30 through November 5th, 1941.

Again, all of these engagements are first-run Syracuse.

We have here a clearance schedule, which was produced by Universal, but which I do not believe was identified while Mr. Murray was on the stand. If there is any question about the authenticity we will not offer it. I assume it is a copy of a schedule that the defendants have in their possession.

Mr. McClennen: How do you know that this is a Universal schedule?

Mr. Wright: I understand it was produced by Mr. Murray pursuant to a subpoena, but it was not included in any of the folders that were identified by him while he was on the stand. That is all I know about it, and, as I say, I assume that it is a copy of a schedule that the defendants [fol. 4720] have in their files.

Mr. McClennen: May this be done: May it be marked as

an exhibit and if we find on checking that it is not right it will go out on our notifying Counsel?

Mr. Wright: That is entirely agreeable?

Mr. McClennen: I notice that there is one place where 120 days in type is changed to 90 in pencil and the name of the company does not appear on the sheet.

The Court: Very well.

(Thereupon the clearance schedule, produced by Universal, was received in evidence and marked Plaintiff's Exhibit 1009.)

Mr. Wright: Little Falls, Warner contract, Exhibit 611-A, should be changed to 635-D. That is a contract dated September 19, 1931, with W. Wood, for the Hippodrome Theatre, and is in evidence at page 3825.

(Thereupon the Warner contract, Little Falls, N. Y., dated September 19, 1931, referred to was received in evidence and marked Plaintiff's Exhibit 635-D.)

Mr. Wright: That concludes our case.

The Court: Is there anything more, Mr. McClennen?

[fols. 4721-4723] Mr. McClennen: No.

The Court: Then this concludes the taking of testimony. I want to thank all the Counsel for their uniform courtesy throughout the trial of this case and the fairness of Counsel in endeavoring to agree on those matters that were not to be disputed.

Mr. McClennen: For my part, I thank you, your Honor, and I want to say that we deeply appreciate the attention and consideration that the Court has given our efforts throughout the trial.

Mr. Wright: That also expresses our sentiments, your Honor.

The Court: Then we will adjourn now.

[fol. 4724] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER APPROVING CONTRACT OF SALE

The Court having made an Order, dated and entered on October 9, 1944, directing a further Hearing upon the application for confirmation of the purchase by A. C. Hayman

from Schine Circuit, Inc., as Agent, of certain theatre properties and their leases, to wit: The fee of the State Theatre, Appalachia, Virginia, and the leaseholds on the Appallachian Theatre, Appalachia, Virginia, the Viv Theatre, Corbin, Kentucky and the Liberty Theatre, Pikeville, Kentucky, all pursuant to the terms and conditions of a certain contract between A. C. Hayman and Schine Circuit, Inc., as Agent, which contract is dated October 2, 1944, and has been considered by the Court, and the Court having [fol. 4725] given due notice of such Order of October 9, 1944, and this matter coming on regularly to be heard on the 16th. day of October, 1944, and it appearing to the satisfaction of the Court that there is no sufficient reason why said purchase contract should not be confirmed.

It Is Hereby Ordered that the contract of sale between A. C. Hayman, a resident of Niagara Falls, New York, and Schine Circuit, Inc., a New York Corporation, as agent, which contract is dated October 2, 1944 and provides for the disposal of the fee of the State Theatre, Appalachia, Virginia, and the leaseholds on the Appallachian Theatre, Appalachia, Virginia, the Viv Theatre, Corbin, Kentucky and the Liberty Theatre, Pikeville, Kentucky, be and the same hereby is in all respect ratified, confirmed and approved.

John Knight, United States District Judge.

Dated: Buffalo, New York, October 16, 1944.

[fol. 4726] In the District Court of the United States

[Title omitted]

Report of Defendants—Filed November 16, 1945

The undersigned, so-called, "Schine Defendants," hereby report as follows with respect to the Temporary Consent Order entered herein on the 19th day of May, 1942, and such other orders as have subsequently been entered herein with respect to said Temporary Consent Order, and, particularly the Order of this Court dated October 15, 1944.

1. The transaction between "The Schine Defendants," and, "A. Charles Hayman," of Niagara Falls, New York, referred to in said Order of October 16, 1944, has been closed, Documents of Title having been executed and de-

livered, and, the initial payment having been received by the undersigned Defendants.

2. With respect to the remaining five (5) Theatres, covered by said Temporary Consent Order, to wit:

1. *Opera House*, Lexington, Ky. (Leasehold).

2. *Plaza Theatre*, Malone, N. Y. (Leasehold).

3. *Ada Meade Theatre*, Lexington, Ky. (Leasehold).

[fols. 4727-4730] 4. *Memorial Theatre*, Lexington, Ky. (Leasehold).

5. One-half Interest in Corporation holding lease of *Margie Grand Theatre*, Harlan, Ky.

the undersigned report that notwithstanding repeated efforts to dispose of said five (5) Theatres, they have not been able to dispose of said Theatres.

Upon the 10th. day of November, 1944, the undersigned caused to be published in the Motion Picture Daily, and, the Film Daily, two trade publications having the widest circulation possible in the Motion Picture Industry, paid notices, inviting offers for these five (5) Theatres. The two papers also carried news stories in the same respective issues regarding said notices. No offers have as yet been received.

3. With the original of this report the undersigned is handing the Court a copy of the November 10 issue of the Motion Picture Daily, and a copy of the November 10 issue of the Film Daily, and we respectfully refer the Court to Page 13 of the issue of the Motion Picture Daily, and, Page 16 of the issue of the Film Daily.

Respectfully submitted, Schine Chain Theatres, Inc., et al., by (S.) Edward F. McClennen, Esq., Counsel for Defendants. (S.) Willard S. McKay, Esq., Counsel for Defendants.

[fol. 4731] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

DEFENDANTS' REQUEST FOR FINDINGS—January 24, 1945

The defendants request the Court to make the findings hereinafter set forth.

In order to avoid repetitions in these requests they have been grouped, as far as possible, with indications of the separate applications. The Court is requested to treat them as if the words of each request had been repeated as to each situation.

For brevity the name "Schine" is used to signify the defendant corporations involved, without distinguishing between the principal corporation and any subsidiary.

For brevity the respective principal distributing corporations are described by the single names, respectively, Columbia, Fox, Loew's or Metro, Monogram, Paramount, Republic, RKO, United Artists, Universal, Warner.

In marked contrast with these requests, the plaintiff's requests and brief contain many statements as of facts and conclusions which are either contrary to the evidence or baseless. Some of these are noted in the following brief for defendants, p. 846 *et seq.*

[fol. 4732] First. The defendants request the Court to find that the cities and towns in which the evidence shows that the defendants had, or were interested in the ownership or operation of, a theatre at any time between January 1, 1917 and May 19, 1942, were none other than those set forth in the following

List of Cities and Towns

Amsterdam, N. Y.	Fremont, O.	Norwich, N. Y.
Appalachia, Va.	Geneva, N. Y.	Ogdensburg, N. Y.
Ashland, O.	Glens Falls, N. Y.	Oneonta, N. Y.
Athens, O.	Gloversville, N. Y.	Oswego, N. Y.
Auburn, N. Y.	Granville, N. Y.	Paris, Ky.
Ballston Spa, N. Y.	Hamilton, N. Y.	Penn Yan, N. Y.
Bath, N. Y.	Harlan, Ky.	Perry, N. Y.
Bellefontaine, O.	Herkimer, N. Y.	Pikeville, Ky.
Big Stone Gap, Va.	Hudson Falls, N. Y.	Piqua, O.
Bowling Green, O.	Hurlock, Md.	Ravenna, O.
Bucyrus, O.	Ilion, N. Y.	Richmond, Ky.
Buffalo, N. Y.	Kent, Ohio	Rochester, N. Y.
Cambridge, Md.	Lake Placid, N. Y.	Sacandaga Park, N. Y.
Canandaigua, N. Y.	Laurel, Del.	Salamanca, N. Y.
Carthage, N. Y.	Lexington, Ky.	Salisbury, Md.
Clifton Springs, N. Y.	Little Falls, N. Y.	Saranac Lake, N. Y.
Corbin, Ky.	Lockport, N. Y.	Seneca Falls, N. Y.
Corning, N. Y.	Malone, N. Y.	Shelby, O.

List of Cities and Towns—Continued

Cortland, N. Y.	Massena, N. Y.	St. Michaels, Md.
Cumberland, Md.	Maysville, Ky.	Syracuse, N. Y.
Delaware, Ohio	Mechanicsville, N. Y.	Tiffin, O.
Dolgeville, N. Y.	Medina, O.	Tupper Lake, N. Y.
Easton, Md.	Middlesboro, Ky.	Utica, N. Y.
East Rochester, N. Y.	Milford, Del.	Van Wert, O.
Fairport, N. Y.	Mt. Vernon, O.	Watertown, N. Y.
Federalsburg, Md.	Newark, N. Y.	Whitehall, N. Y.
Fostoria, O.	Norwalk, O.	Wooster, O.

[fol. 4733] Second. The defendants request the Court to find the facts to be as to each city and town separately in the foregoing list as follows:

1. It does not appear on the evidence that in fact the defendants have monopolized trade or commerce among any of the several states for Amsterdam, N. Y.

The defendants repeat this request with respect to each of the cities and towns in the list on page 101, substituting for Amsterdam the name of the particular city or town.

2. It does not appear on the evidence that in fact the defendants have conspired with Columbia to restrain trade or commerce among any of the several states for Amsterdam, N. Y.

The defendants repeat this request with respect to each of the cities and towns in the list on page 101, substituting for Amsterdam the name of the particular city or town.

3. It does not appear on the evidence that in fact the defendants have conspired with Fox to restrain trade or commerce among any of the several states for Amsterdam, N. Y.

The defendants repeat this request with respect to each of the cities and towns in the list on page 101, substituting for Amsterdam the name of the particular city or town.

4. It does not appear on the evidence that in fact the defendants have conspired with Loew's to restrain trade or commerce among any of the several states for Amsterdam, N. Y.

The defendants repeat this request with respect to each of the cities and towns in the list on page 101, substituting for Amsterdam the name of the particular city or town.

5. It does not appear on the evidence that in fact the defendants have conspired with Monogram to restrain trade

or commerce among any of the several states for Amsterdam, N. Y.

[fol. 4734] The defendants repeat this request with respect to each of the cities and towns in the list on page 101, substituting for Amsterdam the name of the particular city or town.

6. It does not appear on the evidence that in fact the defendants have conspired with Paramount to restrain trade or commerce among any of the several states for Amsterdam, N. Y.

The defendants repeat this request with respect to each of the cities and towns in the list on page 101, substituting for Amsterdam the name of the particular city or town.

7. It does not appear on the evidence that in fact the defendants have conspired with RKO to restrain trade or commerce among any of the several states for Amsterdam, N. Y.

The defendants repeat this request with respect to each of the cities and towns in the list on page 101, substituting for Amsterdam the name of the particular city or town.

8. It does not appear on the evidence that in fact the defendants have conspired with Republic to restrain trade or commerce among any of the several states for Amsterdam, N. Y.

The defendants repeat this request with respect to each of the cities and towns in the list on page 101, substituting for Amsterdam the name of the particular city or town.

9. It does not appear on the evidence that in fact the defendants have conspired with United Artists to restrain trade or commerce among any of the several states for Amsterdam, N. Y.

The defendants repeat this request with respect to each of the cities and towns in the list on page 101, substituting for Amsterdam the name of the particular city or town.

10. It does not appear on the evidence that in fact the defendants have conspired with Universal to restrain trade or commerce among any of the several states for Amsterdam, N. Y.

[fol. 4735] The defendants repeat this request with respect to each of the cities and towns in the list on page 101, sub-

stituting for Amsterdam the name of the particular city or town.

11. It does not appear on the evidence that in fact the defendants have conspired with Warner to restrain trade or commerce among any of the several states for Amsterdam, N. Y.

The defendants repeat this request with respect to each of the cities and towns in the list on page 101, substituting for Amsterdam the name of the particular city or town.

[fol. 4736] Third. At the end of the year 1930 Schine had disposed by sale, lease or otherwise of all the theatres formerly owned or operated by Schine except those in Buffalo, Cortland, East Rochester, Fairport, Lockport, Geneva, Malone, Massena, Ogdensburg and Rochester, and a half interest with Shea in Amsterdam—Test. 4113.

2. In 1933 twenty-five theatres situated respectively in *sixteen* towns, Auburn, Bath, Canandaigua, Carthage, Corbin, Corning, Gloversville, Herkimer, Little Falls, Newark, Norwich, Oneonta, Oswego, Salamanca, Saranac Lake, Syracuse and Watertown, N. Y., came back to Schine as a consequence of the Fox-Metropolitan bankruptcy proceedings—Int. Ans. 17 (A), pp. 1-11.

3. Schine's purpose and effect in obtaining these was to resume the conduct of theatre business in these towns, and not to restrain or monopolize commerce among any of the several states—T. 4150-4170.

4. The purpose was not either the destruction or absorption of competitors—same references.

5. The number of motion picture theatres operating in New York State was upwards of 1350; in Ohio, upwards of 800; in Kentucky, upwards of 200; in Maryland, upwards of 200; in Virginia, upwards of 270; in Delaware, upwards of 30.

[fol. 4737] Fourth. The amount expended by Schine for the cost of land and buildings acquired is set forth in the first money column of pages next succeeding this, and the additional amounts expended by Schine above the cost of acquisition are set forth in the last money column of the same pages.

[fol. 4738]

Theatres Owned

Town	Theatre	Cost of Land and Building as Acquired	Cost of Building and Improvements Since Acquisition
Amsterdam	Strand	$200,000.00	$55,000.00
"	Regent	142,000.00	8,000.00
Ashland	Ashland	15,000.00	197,500.00
Athens	Athena	135,000.00	13,000.00
Auburn	Auburn	83,500.00	245,000.00
Bellefontaine	Holland	27,500.00	196,800.00
Bucyrus	Bucyrus	15,500.00	81,500.00
Canandaigua	Lake	15,000.00	38,500.00
"	Playhouse	180,000.00	16,700.00
Carthage	Strand	57,500.00	24,500.00
Corning	Fox	18,000.00	101,500.00
Cortland	State	60,000.00	233,500.00
" "	Temple	96,000.00	7,000.00
Cambridge	Arcade	60,000.00	5,500.00
Cumberland	Strand	235,000.00	45,500.00
Easton	Avalon	95,000.00	7,800.00
"	Easton		52,000.00
Federalsburg	Federal	50,000.00	2,500.00
Fairport	Temple	77,000.00	47,500.00
Geneva	Temple	97,900.00	17,000.00
"	Geneva	88,000.00	313,000.00
Gloversville	Hippodrome	22,500.00	117,500.00
"	Glove	126,000.00	109,300.00
Glens Falls	Rialto	250,000.00	45,000.00
Hamilton	State	22,500.00	47,300.00
Herkimer	Liberty	188,500.00	15,000.00
Hudson Falls	Strand	40,000.00	7,000.00
Ilion	Capitol	250,000.00	14,000.00
Kent	Kent	130,000.00	7,500.00
Lexington	Ben Ali	200,000.00	20,000.00
Little Falls	Rialto	210,300.00	21,000.00
Lockport	Rialto	27,500.00	118,400.00
"	Palace	200,000.00	8,000.00
Malone	Malone, formerly Grand	151,800.00	106,000.00
Middlesboro	Manring	85,000.00	10,600.00
Milford	Plaza	62,500.00	50,500.00
Newark	Capitol	20,000.00	143,700.00
Norwich	Colonia	80,700.00	20,500.00
Ogdensburg	Strand	137,000.00	155,800.00
Oswego	Oswego	42,500.00	249,800.00
"	Strand	75,000.00	2,000.00
"	Capitol	60,000.00	3,500.00
Oneonta	Palace	161,800.00	4,500.00
"	Oneonta	130,000.00	24,300.00
Paris	Paris	24,000.00	71,000.00
Penn Yan	Elmwood	110,000.00	10,000.00
Ravenna	Ravenna	128,500.00	9,500.00
"	Ohio	33,000.00	44,500.00
Richmond	Madison	75,000.00	5,500.00
Rochester	Riviera	304,100.00	7,500.00
"	Cameo	60,000.00	25,500.00
"	Grand	95,000.00	16,000.00
"	State	145,000.00	9,000.00
Salamanca	Senaca	24,300.00	164,300.00
Saranac Lake	Pontiac	135,000.00	165,500.00
Salisbury	Wicomico	26,600.00	7,600.00
		$6,509,100.00	$3,606,400.00

[fol. 4739]

Theatres Leased

Town	Theatre	Additions and Improvements
Ashland	Palace	$10,500.00
Auburn	Palace	14,500.00
Amsterdam	Rialto	68,000.00
Auburn	Jefferson	4,500.00
Bath	Babcock	9,500.00
Bellefontaine	Strand	4,500.00
Delaware	Strand	48,500.00
East Rochester	Rialto	6,000.00
Corbin	Hippodrome	3,500.00
"	Viv	2,500.00
Geneva	Regent	3,000.00
Glens Falls	Empire	10,000.00
Laurel	Waller	14,500.00
Lexington	Kentucky	27,500.00
"	Strand	6,500.00
Massena	Massena, formerly Strand	72,500.00
Mt. Vernon	Vine	3,300.00
"	Memorial	6,100.00
"	Vernon	48,600.00
Ogdensburg	Pontiac	8,700.00
Piqua	Miami	8,000.00
"	Piqua, formerly Ohio	10,500.00
Paris	Bourbon	15,000.00
Pikeville	Liberty	2,800.00
Perry	Auditorium	7,500.00
Seneca Falls	Strand	19,500.00
Salisbury	Arcade	29,300.00
Syracuse	Eckel	78,300.00
Tupper Lake	State	8,800.00
Van Wert	Van Wert	3,500.00
Watertown	Avon	38,500.00
"	Olympic	37,500.00
		$631,600.00

Theatres Less Than 100% Either Owned or Leased

Town	Theatre	Land	Improvements
Norwalk	Norwalk	$16,350.00	$123,100.00
"	Forum		17,500.00
Wooster	Wayne	12,000.00	66,000.00
"	Wooster		37,500.00
Tiffin	Ritz		6,900.00
Benton partnership—approximately			50,000.00
			$301,000.00

Ex. D-150, Interrogatory Answer 19, p. 12; Testimony 4055, 4221-4226.

[fol. 4740] These total expenditures for original acquisition and for additions and improvements were paid out not by Mr. Schine personally, but by the Company, from money which came from stockholders, and from money borrowed by the corporation, and from income derived from theatre operations, and from real estate investments—T. 4181, 4179.

Schine paid this original purchase money of $6,509,000 and added these buildings and improvements at a cost of $3,506,400 and $631,000 and $301,000 for the purpose of conducting the business of theatre exhibition locally in the respective cities and towns with such attractiveness to patrons as Schine hoped would make the business profitable, and not for the purpose of driving anybody out of town or out of business—Ex. D-150; T. 4044-4193.

These amounts, as appears from page 403, do not include the very substantial amounts originally paid by Schine for leasehold interests, as only sums paid for additions and improvements are there stated.

[fol. 4741] Fifth. The defendants request the Court to make the findings of fact as to each city and town as set forth immediately hereinafter under the name of the respective city or town as follows.

For convenience of reference these cities and towns have been arranged in these requests alphabetically.

[fol. 4742]

AMSTERDAM

Pop. 33,329

1. Schine became half owner of the Regent theatre, and of the Strand theatre and of the lease of the Rialto theatre on September 10, 1928, and of the other half of these three in 1935 or 1936, at a cost of $342,000 in the aggregate—Int. Ans. 17(A), Ex. D-150.

2. Schine expended for building and improvements since acquisition, of the Strand $55,000, of the Regent, $8,000, and of the Rialto $68,000.

3. Maurice Kronick operated the Orpheum theatre from July 1, 1931 to May 1941—T. 2303.

4. The Orpheum was originally a store and after remodeling had 299 seats, of which the first six rows were of little use, and it had no retiring rooms—T. 2318.

5. In the first place Kronick went to Schine and told him that the city was not large enough for two second run theatres and that he was ready to sell out for $10,000—T. 2321, 2310.

6. Kronick had no lease but was a tenant at will and had only equipment to sell—T. 2312, 2321.

7. Kronick was ready to go out of business if he could make a good deal—T. 2322.

8. Kronick did not conduct a daily continuous operation—T. 2324.

9. Kronick closed the theatre for a few weeks or a month several summers as business was very poor in the city and he would take a vacation—T. 2325.

[fol. 4743] 10. The Schine theatres were all operated, the Rialto and the Strand as first-run houses, and the Regent as a second run house—T. 2325, 2309, 2312.

11. According to Kronick the Strand and the Rialto were nice houses when he saw them in 1941-42—T. 2320.

12. The town was primarily a one-industry town, carpets—T. 2325.

13. Business was falling off in 1940-41—T. 2324.

14. When Kronick went to Schine it was his desire to go out of business if he could make a good deal, and when he sold he had made up his mind to get out of business—T. 2322.

15. In May 1941 Kronick sold the good will of the business and all the equipment, furniture and fixtures, with the usual clause not to engage in the same line of business in the city of Amsterdam for a period of five or six years, for $7,000—T. 2304, 2308.

16. The Rialto and the Strand each had a seating capacity of over 1,000 seats—T. 2319.

17. Kronick admittedly had sufficient second run with Paramount, Warner, Fox and Columbia. Later he got Metro second run along with Paramount, Universal and Columbia—T. 2320, 2322-3.

[fol. 4744] APPALACHIA

1. In February 1941 Schine became lessee of the Appalachian theatre, 859 seats, and owner of the State theatre, 379 seats—Int. Ans. 17(A), p. 19.

2. Schine bought and booked for the Appalachian theatre from May 1940 to February 1941 and received therefor $297.36 to August 3, 1940 when payment ceased—Int. Ans. 17(B), (C), p. 4.

[fol. 4745] ASHLAND

Pop. 12,453

1. In November 1935 Schine became lessee of the Palace theatre, 634 seats, to the extent of 75%, and in October 1937 of the remaining 25%—Int. Ans. 17(A), p. 11.

2. In May 1936 Schine became lessee of the Opera House to the extent of 75% and in October 1937 of the remaining 25% and disposed of it in February 1941 when the City of Ashland, the owner, condemned the theatre and dismantled it—Int. Ans. 17(A), p. 11.

3. In July 1938 Schine became lessee of the Ohio theatre, 307 seats—Int. Ans. 17(A), p. 11.

4. Schine expended for additions and improvements to the Palace, $10,500—Ex. D-150.

5. Schine expended for the acquisition of the land for the Ashland theatre $15,000, and in the building and improvement of the theatre $197,500—Ex. D-150.

[fol. 4746] ATHENS

Pop. 7,696

1. In September 1935 Schine became owner of the Athena theatre, 893 seats, at a cost of $135,000, and expended in addition for building and improvements thereafter $13,000—Int. Ans. 17(A), p. 11.

2. In January 1936 Schine became lessee of the Court theatre, 267 seats, and of the Ohio theatre, 299 seats—Int. Ans. 17(A), p. 12.

[fol. 4747] AUBURN

Pop. 35,763

1. In 1923 Schine became lessee of the Palace theatre, 850 seats, and thereafter owner of the land on which the Auburn theatre, 1800 seats, was subsequently built—Int. Ans. 17(A), p. 1.

2. Schine and M. A. Shea became equal lessees of the Palace theatre, the Jefferson theatre, 1100 seats, and owners of the Strand theatre in 1927. In 1937 Schine bought Shea's 50 percent interest—Int. Ans. 17(A), p. 1.

3. A part of the land on which the Auburn theatre was built had on it an abandoned church, which subsequently burned down. Originally this land and church was acquired at a cost of $35,000—T. 4221.

4. Additional land subsequently bought for this new Auburn theatre cost $18,316—T. 4221.

5. Taxes, interest and insurance during the period of idleness of the church and the vacant land brought the actual land cost up to $83,500—T. 4225-26, Ex. D-150.

6. Schine expended for the construction and equipment of the new Auburn theatre $245,000—T. 4064, Ex. D-150.

7. Schine expended for additions and improvements to the Palace theatre $14,500, and to the Jefferson $4500—T. 4064, Ex. D-150.

8. Schine built the new Auburn theatre in 1938, at a time when the town did not have a modern theatre and needed one—T. 4066.

9. The Auburn theatre is located in the heart of the city, has a fine large lobby, spacious public rooms with every [fol. 4748] modern convenience, has a large auditorium with very luxurious seats, finely decorated walls, refrigerated air which works on a basis of conditioning the air as wanted, and is very attractive all the way through to the point where it brings people from all around the entire area to Auburn—T. 4066.

10. The Auburn, ever since its construction, has been the first run house—T. 4067.

11. The Strand was condemned by local authorities and then was torn down—T. 4067.

12. The Jefferson theatre was always the leading theatre in Auburn from a time prior to 1928 until the construction of the Auburn—T. 4065.

13. Fox-Metropolitan conducted this operation from 1929 to 1933 and Schine-Shea then resumed it and continued it until Schine bought Shea's interest and the new Auburn theatre was built—T. 4065.

14. Schine operated the Palace as its second best theatre with the same Fox-Metropolitan interruption—T. 4067.

15. After the opening of the Auburn, Schine made effort, without success, to obtain pictures for the continued full-time operation of the Jefferson theatre—T. 4070-72.

16. After the new Auburn opened, it ran first run and the Palace ran first run sloughs and second run. The Jefferson at first played three changes and then two changes a week and finally week-ends with two first run pictures and was kept closed the rest of the week—T. 4073.

17. Schine knew of no reason for closing the Jefferson down to a week-end operation except the lack of pictures—T. 4073.

[fol. 4749] 18. Hubert P. Wallace says that Schine operated the three theatres, the Jefferson, the Palace and the Strand, full time from 1935 to 1938—T. 2769.

19. Hubert P. Wallace began to operate the Capitol theatre in Auburn in April 1931—T. 2756.

20. At this time the Jefferson, Palace and Strand were in operation by Fox-Metropolitan—T. 2756.

21. The Capitol was a rather old upstairs house—T. 4066, 3069, Ex. D-122.

22. From 1931-1933 the greater part of the first run pictures were licensed to Fox-Metropolitan, and after 1933 to Schine.

23. Wallace had the first run of Columbia pictures for the season of 1934-35 and thereafter—Ex. D-123, D-124, T. 3071-79.

24. Wallace had Columbia franchises from June 17, 1937 through five years—Ex. D-125, D-129, T. 3080-83.

25. When Wallace started operating the Capitol in 1931 the other three theatres, Jefferson, Palace and Strand, had Paramount, Metro, Fox, RKO, Warner and Universal and Wallace had United Artists, Columbia and Pathe—T. 3085, 2757.

26. In 1931 an employee of United Artists and an employee of Columbia each had a financial interest in the operation of the Capitol theatre. This interest had ceased by 1933—T. 3096.

27. From 1927 to 1937 the Shea Circuit had a half interest in the Jefferson, Palace and Strand theatres—Int. Ans. 17 (A), p. 1.

[fol. 4750] 28. In the fall of 1933 Paramount was unable to negotiate a 33-34 contract with the Shea interests and therefore could not make contracts with the Shea-Schine partnership, with the result that the Capitol was the only outlet for Paramount product in Auburn for that season—T. 3096, 4598.

29. Late in the season, on February 8, 1934, Paramount made a contract with Wallace for the 33-34 product—T. 3097.

30. The Fox-Metropolitan operation of the theatres in Auburn was under the management of Mr. Skouras—T. 3100.

31. Wallace appreciated the fact that this operation had first call on the product for the Jefferson and Palace theatres —T. 3100, Ex. D. 130.

32. In 1935 Wallace had all of United Artists, 44 of Columbia, some RKO rejects and, roughly, 100 Independents and Westerns, all first run product—T. 3101.

33. In this period Wallace was cutting his public admission prices and giving discounts—T. 3108.

34. There isn't any question that Wallace could buy substantially all the foreign pictures at any time from anybody—Wright 3113-14.

35. For the year 1934-35 Paramount sold the Shea Circuit generally, including the Shea-Schine Auburn theatres—T. 4601.

36. In the season 1933-34, in which Paramount sold its product first run to Wallace, the film rental revenue averaged less per picture than for the subsequent season in which Paramount sold to Schine-Shea—Ex. 986, T. 3909.

37. In September 1938, after the opening of the Auburn, Schine's weekly requirements for pictures were: For the Auburn 3, for the Palace 6, for the Jefferson 6 until shortage [fol. 4751] of pictures compelled the cutting of the Jefferson down to week-ends, and 2 pictures. Before this cut, allowing the usual ten percent right of rejection of pictures unsuitable for a particular theatre, or not actually released, Schine required contracts for 866 pictures, to leave after the ten percent rejection, 780 annually—T. 4073.

38. This was nearly three times the number of pictures in the aggregate released annually by Columbia, Fox, Loew's, Paramount, RKO, United Artists, Universal and Warner. Release Schedules in evidence of these distributors, Exs. Columbia 682, Fox 337, Metro 619, Paramount 687, RKO 634, United Artists 717, Warner 645, Universal T. 2160, Ex. 704 Id.

39. Schine's inability to get any second run pictures from Fox and Columbia, necessitated cutting down the Jefferson to week-ends—T. 4073, 2789.

40. Wallace's efforts were to get first run pictures for the Capitol, a theatre which was not equal in box office drawing power to the Auburn, the Jefferson and the Palace —T. 2770, 4066, 3069, Ex. D-122.

41. Lux did not point out to Wallace that it would not be a practical thing for Wallace to run second run and first run at the same time—T. 4443, 4441.

42. There is no evidence as to the number of pictures per week that Wallace required from 1931 to 1942, except for the year 1938, as in which there is evidence that he played two hundred and five pictures—T. 4670, 4686, 4694-96.

43. In 1935 Wallace ran double features 2 or 3 changes a week and sometimes also used Westerns for Saturday morning shows for children—T. 3106.

44. The Auburn, Palace and Jefferson theatres needed more pictures annually than all the first and second run of

Columbia, Fox, Metro, Paramount, RKO, United Artists, Universal and Warner—Release Schedules Ex. 337, 619, 634, 645, 682, 687, 717, T. 2160, Ex. 704 Id.

[fol. 4752] BALLSTON SPA

Pop. 4,443

1. In April 1937 Schine became the owner of a 50% interest in the lease of the Capitol theatre—Int. Ans. 17(A), p. 2.

[fol. 4753] BATH

Pop. 4,696

1. In October 1924 Schine became lessee of the Babcock theatre, 693 seats—Int. Ans. 17(A), p. 1.

[fol. 4754] BELLEFONTAINE

Pop. 9,808

1. In 1930 a delegation from Bellefontaine called on Mr. Schine with reference to the establishment of a new theatre in Bellefontaine—T. 4117-18.

2. As a result of the call of that deputation Schine acquired land in Bellefontaine at a cost of $27,500, on which Schine built the Holland theatre, 1319 seats, at an additional cost of $196,800, which was opened on February 12, 1931—T. 4117-4119.

3. This theatre is built of brick and steel and completely fireproof, and is known as atmospheric, with clouds and stars in the ceiling, of Dutch design and decoration and seats around 1400 people, with modern convenience and appointment for public spaces and air conditioning and cushion seats, with springs in them, and the very latest projection and screen—T. 4119, 1801.

4. At this time Milton A. Mooney as lessee was operating the Strand theatre—T. 1812.

5. Mooney had theretofore operated the Majestic only during the annual fair week, and in the years 1928-31 it was closed entirely—T. 1749.

6. The Majestic was very small and a very old converted store show, with 250 seats, without equipment for sound pictures—T. 1750.

7. Mooney also had the Opera House, an upstairs house, 75 years old, without sound equipment and closed except for an occasional stage show—T. 1753.

8. The Majestic and the Opera House were of no value and the balance of the lease on the Strand and its equip-[fol. 4755] ment, which had been in use seven years, was all that Mooney had to sell—T. 1812, 1759.

9. In May or June 1931 Mooney saw Mr. May, who offered $2500 for the lease and Mooney sold the balance of the lease of the Strand and its equipment, which had been in use seven years, in July 1931—T. 1659, 1812, 1759, Int. Ans. 17(A), p. 12.

10. Six weeks before the Holland opened on February 12, 1931 the Strand on December 27, 1930 advertised the sale of $2.50 worth of tickets for $2.00—T. 2295.

11. In February 1931 the advertised admission prices of the Strand were 10¢ and 30¢ throughout the day and evening after 2 P. M.—T. 2291.

12. This made the top admission price for ticket book holders 24¢.

13. The Holland at opening on February 12, 1931 had admission prices matinee, children 10¢ and adults 30¢, nights, children 15¢ and adults 40¢—T. 2290.

14. February 20, 1931 the Strand reduced its afternoon admission prices to 25¢, making a price to ticket book holders, of 20¢—T. 2291.

15. On March 12, 1931 the Strand advertised admissions from 1:30 to 2:00 o'clock, called an Early Bird Matinee, 15¢—T. 2293.

16. The following day the Holland advertised that starting March 15, 1931 the admission prices would be, matinee, balcony 15¢, main floor 25¢, nights, balcony 25¢, main floor 40¢, children all times 10¢—T. 2293-94.

17. March 14, 1931 the Strand advertised from 5:30 to 6:30 admissions 15¢, and beginning March 15, 1931 from two [fol. 4756] o'clock, admissions 10¢ and 25¢, with Bargain Matinees Mondays, adults 15¢, and nights 25¢—T. 2293-94.

18. The Strand advertised several repetitions of $2.50 books for $2.00—T. 2296.

19. May 14, 1931 the Strand advertised, this complete ad and 25¢ admit two tonight—T. 2298.

20. May 29, 1931 the Strand advertised 15-cent bargain admissions Friday from 6:30 to 7:30 and Saturday from 1:30 to 2:30 and from 5:30 to 6:30, and a Memorial Day price for children from 2 to 6 P. M., 5¢—T. 2298.

21. May 14, 1931 the Holland advertised matinee prices 15¢ and 25¢, nights 25¢ and 40¢ and kiddies 10¢—T. 2298.

22. When Schine bought the land and began to build the Holland theatre he was operating only in the cities and towns named in the third request.

[fol. 4757] BIG STONE GAP

1. Schine did the buying, booking and supervising of the Big Stone theatre, Big Stone Gap, from May 1940 to February 1941 for $208.36, payment ceasing August 3, 1940—Int. Ans. 17(B), (C), p. 4; T. 3768.

[fol. 4758] BOWLING GREEN

Pop. 7,190

1. In June 1939 Schine began buying and booking for the Cla-Zel theatre, 776 seats and the Lyric theatre, 348 seats. On April 1, 1941 Schine became the lessee of these theatres. Schine gave up the lease in June 1942, following the Consent Order of May 19, 1942—Int. Ans. 17(A), p. 15.

[fol. 4759] BUCYRUS

Pop. 9,727

1. At some time prior to 1934 the Moose Lodge or other local interests started to build a new theatre but did not have enough money to complete it.—T. 1050, 1043.

2. In the early part of 1935 a group of citizens of Bucyrus came to see Schine on the subject of building a theatre in Bucyrus and took Schine to see an uncompleted theatre in the town and talked to him on the subject of how the theatre had come to be in that shape, with the walls up and the steel up, standing that way for two or three years, with the girders on the roof—T. 4143-44.

3. Schine bought the land and uncompleted structure in August 1935 at a cost of $15,500, and completed the Bucy-

rus theatre, 1,097 seats, in 1936, at a cost in addition of $81,500—Int. Ans. 17(A), p. 12; Ex. D-150; T. 4139.

4. The Bucyrus theatre is a big, beautiful modern brick and steel structure with all modern improvements and ample public spaces, air conditioned, with a lower floor furnished with fine upholstered seats, and a balcony and two small stores in front, and a marquee with a large sign in front. It is located in the heart of the city, a best location—T. 1045, 4140, 4144, 1044.

5. In 1935 Harry Charnas, a brother of Philip Charnas, talked to Schine about the possibility of buying out his brother, Philip. This was the first thing that occurred with respect to the purchase subsequently made in consequence of this conversation and as the result—T. 4138, 4136, 4135, 4139.

6. The Southern theatre, 450 seats, was an old theatre, the lease of which Philip Charnas sold to Schine in April 1937—T. 1042, Int. Ans. 17(A), p. 12.

[fol. 4760] 7. In June 1934 Milton H. Bryer began to operate the State theatre, a small, old fashioned theatre, and continued to operate it until he sold it to Schine for operation beginning September 29, 1935—T. 1042, 1026, 1041, Int. Ans. 17(A), p. 12.

8. On July 13, 1935 Bryer signed a contract with Vitagraph for the first run of its 1935-36 product which was approved on September 5, 1935 and sent to Bryer on September 9, 1935. Bryer advertised a picture, "Page Miss Glory", with Marion Davies as star, in the Bucyrus newspaper, the Telegraph-Forum of Friday, September 6, 1935, and played it under this contract for three days, beginning September 8, 1935, on percentage. Bryer's contract was numbered 4447, and was sent to the Vitagraph home office for approval, together with other contracts bearing consecutive current numbers, and an abstract of transmittal, under date of August 15, 1935—Exs. D-170, D-171; T. 4324, 4154; Ex. D-154; T. 4666; Ex. D-148 A-F, Id. Ex. D-164; T. 4328, 4163.

9. Thereafter, about November 29, 1935, two months after Schine bought the State theatre, this Bryer contract was cancelled and was replaced by a superseding contract with Schine covering the same 1935-36 Vitagraph pictures, ex-

cept for those that had already been played and were crossed out from the substituted contract. These included one picture, "Page Miss Glory," which Bryer had already played beginning September 8, 1935. The superseding contract with Schine was given the same date as the contract with Bryer, for which it was substituted, and bore contract number 4797, which was the transmittal number then current in the Vitagraph office, some three months later in the series of numbers than the number 4447 on the Bryer contract, and appeared in the abstract of transmittal with which it was sent to the home office under date of December 2, 1935. The cancellation notice on the Bryer contract was [fol. 4761] dated December 11, 1935—T. 1041; Ex. 62, Id. Ex. P-65; T. 4325; Id. Ex. D-165; T. 4129; Ex. D-148 A-F; T. 4324-28, 4162.

10. In the negotiations for the sale of the lease of the Southern by Charnas to Schine and in the negotiations for the sale by Bryer of the lease of the State to Schine, Schine made no threats or misrepresentations and did not say to either of them that if he did not sell he would have difficulty in getting product for his theatre, or that if he did not sell Schine would open up another theatre, and Schine did not tell any one else to make any such statements, and was not aware that any one had made such statements, and has not said that he approved of their making or having made any such statements—T. 4150, 4167-70.

11. The Fox salesman offered Fox first run product to Charnas before selling Schine—T. 1072-4.

12. Charnas testified that he had not played Paramount product for the two seasons prior to 1935,36—T. 1044-5.

13. The uncompleted theatre was sold to Schine at a public sale. Charnas did not bid although he had an opportunity to do so—T. 1103.

[fol. 4762] BUFFALO

Pop. 575,901

1. In December 1926 Schine became lessee of the Granada theatre, 1702 seats, and the owner in June 1939—Int. Ans. 17(A), p. 2.

2. In August 1926 Schine became lessee of the Riverside theatre, 1281 seats, and the owner in December 1940—Int. Ans. 17(A), p. 2.

3. In June 1928 Schine became lessee of the Jubilee theatre, and surrendered the lease in March 1933—Int. Ans. 17(A), p. 2.

[fol. 4763] CAMBRIDGE

Pop. 10,102

In April 1938 by one contract Schine became owner of over 90% of the Arcade, 933 seats, the State, 833 seats, and the Grand theatres. The Grand had been closed for some time prior thereto—Int. Ans. 17(A), p. 18.

[fol. 4764] CANANDAIGUA

Pop. 8,321

1. In October 1924 Schine became owner of the Playhouse, 1070 seats, at a cost of $180,000, to which improvements were added at a cost of $16,700, and has operated it thereafter except for the period of the Fox-Metropolitan operation 1929-1933—Int. Ans. 17(A), p. 2, T. 4074, Ex. D-150.

2. About 1937 Schine took up for consideration the possibility of building an additional theatre in Canandaigua, when there was prospect of the construction of a large veteran's hospital that would bring several hundred families into town—T. 4074.

3. The planning and finishing of the theatre took about two years—T. 4077.

4. Schine was not actuated in any way in taking the steps relative to building the theatre by any knowledge that any one else was thinking of building there or opening a theatre—H. 4077.

5. Schine paid $15,000 for the land and structure on it and paid in addition for building the Lake theatre $38,500—Ex. D-150, T. 4079.

6. The new theatre, the Lake, is smaller than the Playhouse and located in the very busy part of Canandaigua, has fine lavatory space and seats about 400 or 450, with

fine upholstered, spring cushion seats, the latest projection equipment, as well as sound equipment, and very artistic decorations—T. 4079.

7. The building of the hospital did not bring the expected increase in business, and the Lake, after being kept open for some time, was closed and then reopened again from time to time—T. 4080, 4199-4201.

[fol. 4765] 8. In the spring of 1938, Anthony J. Lauer, a real estate broker, sought to get a lease of the Jenkins block in Canandaigua for Mr. Wallace from Mr. Jenkins and Mrs. Himes, who had inherited the block from their father—T. 4626.

9. These negotiations were not dropped by Mr. Lauer in May 1938 (T. 2564), but on the contrary he made a later offer (Ex. D-179, T. 4665) and continued his efforts to acquire the property as late as June 23, 1938—Ex. D-178, T. 4632.

10. Hobert L. Himes, an attorney (T. 4623) and the husband of Mrs. Himes, one of the co-owners, acted as attorney for the Jenkins estate in these negotiations—T. 4657, 2791-92, 3066-67.

11. He does not recall that he had any knowledge of any activities on the part of Mr. Schine or prospect of Mr. Schine's building or opening a new theatre in Canandaigua on the Flanigan lot—T. 4650.

12. It does not appear that any such knowledge was the reason for rejecting the offer—T. 4653.

13. The defendants offered to show by the testimony of Mr. Himes that the rejection of this offer was not actuated in any way by any expectation or belief or apprehension that the Schine organization was proposing to put a new theatre on the property in Canandaigua, but this was excluded because not material—T. 4662.

[fol. 4766] CARTHAGE

Pop. 4,207

1. In November 1922 Schine became owner of the Strand theatre, 786 seats—Int. Ans. 17(A), p. 2.

2. In March 1935 Schine became owner of the premises on which the State theatre stood and made them into a store and commercial building—Int. Ans. 31.

[fol. 4767] CLIFTON SPRINGS

Pop. 2,500

1. In August 1941 Schine became lessee of the Palace theatre, 340 seats. This lease was given up in July 1942, following the Consent Order of May 19, 1942—Int. Ans. 17(A), p. 11.

[fol. 4768] CORBIN

Pop. 7,893

1. In November 1938 Schine became lessee of the Kentucky theatre, 394 seats, and of the Hippodrome theatre, 824 seats—Int. Ans. 17(A), p. 16.

2. Hiram H. Owens and his wife acquired in about 1935 the property on which the Viv theatre, 516 seats, is now located and about October 24, 1938 Owens made a contract with Grover Scott for the construction and leasing of a theatre, and Scott assigned his contract to Schine. Owens cancelled the contract and then completed the theatre and leased it to Mitchell K. Murphy. Schine bought the lease in May 1940—Int. Ans. 17(A), p. 16; T. 3954, 507.

3. Mitchell K. Murphy operated the Viv theatre, Corbin, from October 1939 to May 1940 and made a profit. He sold it to Schine because he saw a chance to make a good trade, and not because he needed product—T. 635-638, 640.

4. The Hippodrome theatre was a much more substantially constructed and more expensive theatre than the Viv —T. 643, 645.

[fol. 4769] CORNING

Pop. 16,212

1. In 1924 Schine became owner of the Liberty for $18,000, the State and the Regent theatres, as a part of a purchase of these and other theatres from Dygert—Int. Ans. 17(A), p. 3; T. 4081, Ex. D-150, T. 4082.

2. The Liberty burned and Schine built the Fox, 1333 seats, on the site at an additional cost of $101,500—Int. Ans. 17(A), p. 3; T. 4081, Ex. D-150.

3. From 1929-1933 the Liberty, then called the Fox, and the State, 906 seats, were leased to Fox-Metropolitan—Int. Ans. 17(A), p. 3; T. 4081, Ex. D-150.

4. The Regent, which was closed at the time was sold by Schine to Gerber, who subsequently rebuilt and opened it as the Palace, 398 seats, T. 4082, 3183-4.

5. Gaby and Cohen operated a fourth theatre, the Plaza —T. 4083.

6. In 1933 the Fox was a brand new theatre with all modern improvements and appointments, finished in 1929 with the very latest equipment. The State was an old theatre, in good condition and running week-ends when Schine reacquired it—T. 4083.

7. The Palace was a smaller theatre, on which Gerber had expended some money and made a rather attractive little theatre, well located on the main street—T. 4084.

8. The fourth theatre, the Plaza, was located across the railroad track in a community of its own, with several stores, and lacked modern appliances. It was a converted store, a little better than the average store show, with a high ceiling —T. 4084-85.

[fol. 4770] 9. The Fox from its inception was operated as the first run theatre—T. 4084.

10. The State was closed and opened intermittently and usually ran week-ends but occasionally for a full week—T. 4084.

11. The Plaza, when the Palace was closed during the Fox-Metropolitan operation, got some first run and some second run pictures which the Palace didn't play, and thereafter, when the Palace was opened by Gerber, the Plaza got some second and some third runs; T. 3185-3187.

12. The Fox was a 40-cent house and the Palace a 35-cent and the State a 25-cent, and the Plaza at first a 25-cent and then a 20-cent and then a 10- and 15-cent house—T. 3192, 3216-17.

13. In April 1938 Gerber sent for Schine and made a ten-year lease to Schine for an advance rental of $7500 and an annual rental of $6500 or $7500—T. 4085, 4217-18.

14. Thereafter Schine did not have enough product to operate all three theatres and kept the State closed after 1939—T. 3195, Int. Ans. 18, p. 3.

[fol. 4771] CORTLAND

Pop. 15,881

1. Schine became owner of the site of the State theatre, 1632 seats, in September 1926 and completed and opened the theatre in 1930, at a cost of $60,000 for the land and in addition $233,500 for the building and improvements—Int. Ans. 17(A), p. 3; Ex. D-150.

2. In September 1932 Schine became owner at the same time of the Temple theatre, 588 seats, and the Cortland theatre at a cost of $96,000, to which improvements to the Temple were added at an additional cost of $7,000 and the Cortland, closed when acquired, was made into a commercial property—Int. Ans. 17(A), p. 3; Ex. D-150.

[fol. 4772] CUMBERLAND

Pop. 39,483

1. Schine bought the Strand theatre, 1405 seats, by a contract dated May 21, 1940 and a deed of May 1, 1941 for $235,000 and added improvements costing the additional sum of $45,500—Int. Ans. 17(A), p. 18; Ex. D-150.

[fol. 4773] DELAWARE, OHIO

Pop. 8,944

1. In January 1936 Schine became lessee of the Strand theatre, 777 seats, and thereafter made additions and improvements to it at a cost of $48,500—Int. Ans. 17(A), p. 12; Ex. D-150.

2. In March 1938 Schine became lessee of the Star theatre, 266 seats—Int. Ans. 17(A), p. 12.

3. Schine became owner of Bieberson's fifty percent interest in the Delaware operation in January 1940—Int. Ans. 17(A), p. 12.

[fol. 4774] DOLGEVILLE

In March 1923 Schine became owner of the Strand and sold it in March 1933—Int. Ans. 17(A), p. 3.

[fol. 4775] EASTON

Pop. 4,528

1. In October 1938 Schine became owner of the Avalon theatre, 616 seats, and lessee of the Music Hall, 250 seats, at a cost for the Avalon of $95,000, to which Schine added improvements costing $7800. In 1940 Schine became the owner of land on which the Easton theatre, 646 seats, was built at a cost of approximately $52,000, to replace the Music Hall, which was surrendered to the County at its request—Int. Ans. 17(A), p. 18, Int. Ans. 19, p. 12; Ex. D-150.

[fol. 4776] EAST ROCHESTER

Pop. 6,691

1. In October 1924 Schine became lessee of the Rialto theatre, 900 seats, acquired from Dygert, and made additions and improvements to it at a cost of $6,000—Int. Ans. 17(A), p. 3; Ex. D-150.

[fol. 4777] FAIRPORT

Pop. 4,644

1. By lease of November 1926, followed by deed of January 1928, Schine became owner of the Temple theatre, 850 seats, at a cost of $77,000, to which Schine added building and improvement costing $47,500—Int. Ans. 17(A), p. 3; Ex. D-150.

[fol. 4778] FEDERALSBURG

Pop. 1,369

1. In October 1938 Schine became owner of the Federal theatre, 712 seats, at a cost of $50,000 to which Schine added improvements at a cost of $2500—Int. Ans. 17(A), p. 18; Ex. D-150.

[fol. 4779] FOSTORIA

Pop. 13,453

1. In May 1936 Schine became owner of the lease of the Civic theatre, 516 seats, and of the lease of the Roxy theatre, 280 seats—Int. Ans. 17(A), p. 13.

2. In July 1937 Schine became interested to the extent of 50% in the lease of the State theatre, 667 seats—Int. Ans. 17(A), p. 13.

3. Arthur Buck and Ural Buck and others have the other 50% of the leases of these three theatres—same references.

[fol. 4780] FREMONT

1. In April 1931 Schine became lessee of the Strand and the Opera House and disposed of them in August 1931—Int. Ans. 17(A), p. 13.

[fol. 4781] GENEVA

Pop. 15,555

1. In October 1924 Schine became owner of the Opera House and Temple and lessee of the Regent, 1055 seats. After the burning of the Opera House, Schine built the Geneva, 1868 seats, to replace it in 1931. The original cost for the Temple was $97,900, to which Schine added improvements costing $17,000, and the original cost of the Opera House was $88,000, in addition to which Schine expended for the building and improvement of the Geneva $313,000, and for the improvement of the Regent $3,000—Int. Ans. 17(A), p. 4; Ex. D-150.

2. The Geneva theatre was operated full-time, the Regent theatre was operated on a weekend policy only during the summer and full-time otherwise, and the Temple theatre was closed until 1942—Int. Ans. 17-A & 18, p. 4.

3. Schine played second run at the Regent, Geneva, prior to the 1939-40 season and thereafter—Ex. W-4(57) & P. 204.

4. DeToto requested and obtained the product of United Artists, Paramount, RKO, Monogram, Republic and Grand National for the Park theatre. He refused to purchase the product of Warner and Paramount when it was offered to him—T. 912, 918-20.

[fol. 4782] GLENS FALLS

Pop. 18,836

1. Schine became the owner of the Rialto by a lease of March 1933, followed by a deed of January 1937, at a cost of

$250,000, to which Schine added improvements at a cost of $45,000—Int. Ans. 17(A), p. 4.

2. In June 1933 Schine became lessee of the Empire theatre, 750 seats, and added improvements at a cost of $10,000—Int. Ans. 17(A), p. 5; Ex. D-150.

3. June 1, 1940 Schine became lessee of the Paramount theatre, 1186 seats and relinquished its lease in May 1942 following the consent order of May 19, 1942—Int. Ans. 17(A), p. 5.

[fol. 4783] GLOVERSVILLE

Pop. 23,329

1. Schine became lessee of the Hippodrome, 1151 seats, in 1917, and owner in February 1919, at an original cost of $22,500, to which Schine added for new building and improvement at a cost of $117,500—Int. Ans. 17(A), p. 5; Ex. D-150; T. 4045-53.

2. In April 1920 Schine became owner of the Glove, 1298 seats, at an original cost of $126,000, to which Schine added improvements at a cost of $109,300, and owner of The Family, which was made into a store and commercial building—Int. Ans. 17(A), p. 5; Ex. D-150; Int. Ans. 31.

[fol. 4784] GRANVILLE

1. The extent of the interest in the Ritz and the buying of pictures for it and the expenditures for improvements are set out under Mechanicsville hereinafter, Int. Ans. 17(A), p. 11.

[fol. 4785] HAMILTON

Pop. 1,668

1. In August 1934 Schine became owner of the State theatre, 712 seats, at a cost of $22,500, to which Schine added improvements at a cost of $47,300—Int. Ans. 17(A), p. 5; Ex. D-150.

[fol. 4786] HARLAN

Pop. 5,122

1. In January 1941 Schine became owner of a 50% interest in the lease of the Margie Grand, 690 seats, for which

he had booked pictures at a fee of 5% of the gross from 1938—Int. Ans. 17(B), p. 3; Int. Ans. 17(A), p. 16.

2. Price Coomer began to operate the New Harlan, then closed, in 1934 with Columbia and United Artists first run product and the balance 2nd run product. At that time the Margie Grand was playing the first run product of Metro, Paramount, Fox, Universal, Warner and RKO. Subsequently Coomer bought the first run product of Universal and Warner which the Margie Grand had previously played —T. 721-2, 726-8, 732-3.

[fol. 4787] HERKIMER

Pop. 9617

1. In June 1925 Schine became half owner of the Liberty theatre, 1046 seats, and as part of the same transaction lessee of the Richmond theatre, and Schine subsequently became owner of the Liberty at a cost of $185,500, to which Schine added improvements at a cost of $15,000—Int. Ans. 17(A), p. 5; Ex. D-150.

2. Herkimer is the county seat, shopping town and local center for the surrounding area which includes Ilion with which it competes for patronage—T. 3531-2.

3. Herkimer is subject to clearance in favor of Utica which is some 13 miles distant—Exs. 874-878, W-6 (11), W-8 (5), R-2 (11), R-13, F-17, F-101 (13), F-104.

[fol. 4788] HUDSON FALLS

Pop. 6654

1. In July 1935 Schine became the owner of the Strand Theatre, 891 seats, at a cost of $40,000, to which Schine added improvements at a cost of $7,000—Int. Ans. 17(A), p. 5; Ex. D-150.

[fol. 4789] HURLOCK

Pop. 800

1. In October 1938 Schine became the lessee of the Hurlock theatre, 471 seats—Int. Ans. 17(A), p. 18.

[fol. 4790] ILION

Pop. 8927

1. Pursuant to agreements of December 1936 and May 1937 with Schine, Young & Whitney, in 1937, sold their only operating theatre, the Capitol, 1238 seats, the Opera House and a lease of the Temple theatre, to Schine for $250,000, and Schine added improvements at a cost of $14,000, Int. Ans. 17(A), p. 5; Ex. D-150, T. 3502, Exs. 871, 872, Id. Ex. 85, T. 3528, 3497.

2. Ilion is subject to clearance in favor of Utica which is some 10 miles distant. Exs. 874-878, W-6 (11), W-8 (5), R-2 (11), R-13, F-17, F-101 (13), F-104, 867.

3. During the period when Fox Metropolitan operated the theatres in Herkimer and Ilion, Herkimer was granted a clearance of 14 days over Ilion. This clearance was reduced to 10 days after the Ilion theatre was re-acquired by Young & Whitney, Inc. and the Herkimer theatres were reacquired by Schine—T. 3500-2, Exs. 874-878.

[fol. 4791] KENT

Pop. 8581

1. In June 1936 Schine became lessee of the Opera House, 592 seats, and in December 1937 owner of the Kent theatre, 943 seats, at a cost for the Kent of $130,000, to which Schine added improvements at an additional cost of $7500—Int. Ans. 17(A), p. 13; Ex. D-150.

2. The Opera House was closed in September 1937 because of inability to obtain product—Int. Ans. 17(A) & 18, p. 13.

[fol. 4792] LAKE PLACID

1. From May 1926 to May 1936 Schine bought and booked for the Palace Theatre and the Lake Placid Club at 5 percent of the gross receipts—Int. Ans. 17(B), p. 1.

[fol. 4793] LAUREL

Pop. 2884

1. In January 1939 the Waller Estate leased the Waller, 716 seats, to Schine and Schine improved it at a cost of

$14,500. The theatre was rebuilt in 1940 after destruction by fire—Int. Ans. 17(A), p. 19; Ex. D-150, Int. Ans. 18, p. 19.

[fol. 4794] LEXINGTON

Pop. 49,304

1. In November 1936 Schine bought 97 percent of the stock of the Phoenix Amusement Company, owner of the Ben Ali theatre, 1375 seats, lessee of the Kentucky theatre, 1257 seats, and of the State theatre, 895 seats, and of the Strand theatre, 1255 seats, at a cost of $200,000, to which Schine added improvements to the Ben Ali at a cost of $20,000, to the Kentucky at a cost of $27,500, to the Strand at a cost of $6500. In October 1939 Schine became lessee of the Opera House, 1188 seats, and in September 1940, lessee of the Ada Meade, 668 seats—Int. Ans. 17(A), p. 16; Ex. D-150.

2. From 1931 to 1934 the Opera House charged 10 cents for all seats at all times—T. 2934.

3. It is hot in the summertime in Lexington, Kentucky.

4. Schine's reductions in prices were confined to the summertime of years preceding 1939—T. 2927.

5. In the summer preceding Schwartz' lease to Schine, Schine made no reduction in summer prices—T. 2927.

[fol. 4795] LITTLE FALLS

Pop. 10,163

1. In May 1925 Schine became half owner of the Rialto, 1200 seats, and in June 1936 lessee of the Hippodrome, 550 seats, and subsequently owner of the Rialto at a cost for it of $210,300, to which Schine added improvements at a cost of $21,000—Int. Ans. 17(A), p. 5; Ex. D-150.

2. The Rialto was a fine modern theatre with a very fine modern balcony and operated in 1934 with all first run major product except United Artists at admission prices of children 10 cents, balcony 20 cents, orchestra 30 cents, T. 2332, 2333, 2334.

3. The Hippodrome had a very small, not very good balcony and ran at admission prices of children 10 cents, adults 20 cents anywhere in the house—T. 2332-33.

4. Soon after the death of her husband, William J. Wood, Mrs. Marion D. Wood in the fall of 1934 took up the operation of the Hippodrome, which was closed at the time, with Thomas Edward Warne as manager, on a second run policy, the policy which Wood had before he died—T. 2330-32, 2359, 2360.

5. In the spring of 1935 the Hippodrome admissions were reduced and family tickets at the price of a single admission were good for two admissions—T. 2348-49.

6. The Hippodrome was closed in the summer—T. 2348.

7. After a telephone call from Judge Blumberg, Warne called on J. G. Selmser, Assistant Treasurer of Schine Theatres, Inc., who said that he was in position to make an offer—T. 2353.

8. Warne took the matter up with Mrs. Wood and then told Selmser that we wouldn't be tough to do business with [fol. 4796] and invited an offer from him. In the meantime Warne had made an inventory of the equipment and a few outstanding debts and he closed the deal with Mr. Selmser to take over the equipment of the theatre for about $400 and payment of outstanding debts for rent, advertising and local merchants and for electrical work, a total in addition to the cash of, say, $1300—T. 2354-55.

9. The Hippodrome building was owned by the Odd Fellows Temple Association and was operated by Wood and Warne, without any lease. In the spring of 1936 the rent was probably three months in arrears, and there had been a small fire in the theatre and a bill was owed for the consequent repairs—T. 2369-74.

10. The Rialto was operated by Fox-Metropolitan from August 1929 to April 1933—Int. Ans. 17(A), p. 5.

[fol. 4797]

LOCKPORT

Pop. 24,379

1. About 1922 a real estate agent wrote Schine and drove him to Lockport to meet Mr. Thurston, the owner of the Temple theatre, and Mr. Thurston sold him the Temple theatre for $70,000—T. 4060-62.

2. Mr. Thurston suggested that Schine buy his building across the street which had once been a skating rink but

was then used as a garage. The building was a very large one and Schine bought it and rebuilt it into a modern, large motion picture theatre containing 1484 seats, all of which with the exception of 75 to 100 seats were on the ground floor. The name of this theatre was the Rialto Theatre and it had a great advantage over any other theatre in Lockport because of its downstairs seating capacity. The cost to Schine of the Rialto was originally $27,500.00 plus $118,400.00 for improvements—T. 4094-95, Int. Ans. 17(A), p. 6; Ex. D-150.

3. In October, 1927 Schine became a half owner in the lease of the Hi-Art Theatre, 10[illegible] seats, a store show, and in the lease of the Palace Theatre, 1698 seats. In October, 1936 Schine became the owner of the Palace Theatre at a cost of $200,000 to which Schine made increases in rebuilding and improvements to the extent of $8,000—Int. Ans. 17(A), p. 6; Ex. D-150.

4. The Temple was an old, cheaply built theatre, lacking modern appointments and equipment, with good projection but poor seats—T. 4094.

5. At about the time the Rialto was built a group of men started to build the Palace, a very fine theatre, built primarily for vaudeville, with a big stage, high loft, and very [fol. 4798] large balcony with boxes around the sides and leased it to Paramount—T. 4094-4095.

6. At the same time the Hi-Art was rebuilt into a much larger and better theatre than it had been before, and the town from having no theatre worth while had three good theatres. The Temple was the poorest and was torn down for no reason except the product situation, as Schine discovered it to be, and because Schine did not do business in there—T. 4095-96.

7. While Schine was operating the Rialto and the Temple, Paramount had taken a lease on the Hi-Art, and after attempting to operate it for a while they closed it up and operated the Palace with vaudeville and pictures, and Schine played the best pictures in the Rialto, with the Temple playing secondary or slough pictures and second run—T. 4097.

8. The Palace was owned by a group controlled by the father of Charles E. Dickinson, Jr.—T. 4097.

9. In 1928, when Paramount was operating the Palace and Schine was operating the Rialto, Schine started in a partnership with Paramount, receiving a fee of $30 a week for managing, buying and booking, for the Palace as well as the Rialto. This operation continued until ousted from the Palace—T. 4098-99, 4194-96.

10. During this time the Rialto played the best first class pictures and the Palace played vaudeville and pictures and, part of the time, pictures only—T. 4099.

11. The Rialto was playing the first class releases of all the distributors—T. 4100.

12. Later Schine discontinued vaudeville at the Palace and moved the best pictures into the Palace and played first and second run at the Rialto—T. 4101.

[fol. 4799] 13. Schine was then engaged in operating two theatres, the Rialto and the Palace, and on the loss of the Palace was reduced to one operating theatre—T. 4101.

14. Schine restored the first class first run pictures to the Rialto and, after making the necessary improvements in the Hi-Art, put the recent Rialto policy into the Hi-Art so that the Rialto was Schine's best first run house and the Hi-Art was the second best with first run and second run, and that operation continued until about 1937—T. 4102.

15. Before Schine was forced out of the Palace in December 1932 it had negotiated for all its contracts for the 1932-33 product—T. 4103, 4197.

16. When Dickinson opened the Palace, the Rialto was showing all the product of the eight companies, except Metro—T. 1997-98.

17. Charles E. Dickinson, Jr. testified that about October 18, 1933 Mr. Carroll called on him to talk about his accepting an offer which Mr. May had previously made, which was for a rental for the Palace of about $16,000 a year, plus a percentage of the net profits per year, and stated that Schine was withholding opening the Hi-Art for an additional few days for him to decide whether or not he would accept the proposal, and Dickinson said that they weren't interested—T. 2066.

18. October 20, 1933 the Lockport newspaper published: "The merchants of West Main Street welcome the opening

of the newly decorated and thoroughly remodelled Hi-Art theatre, Saturday, October 21, under Schine management, assuring Lockport another high class program for theatre-goers. Come down. The latest releases from the greatest motion picture studios"—T. 2141.

19. Charles E. Dickinson, the elder, died December 7, 1933. James A. White and Mrs. Dickinson and LeGrand O. Robson became executors of his estate—T. 2098-99.

[fol. 4800] 20. On May 21, 1935 the executors wired Schine requesting a meeting on a strictly confidential matter and following this they went to Rochester with their attorney and met Myer Schine and Mr. May and informed them that they wanted to sell the Palace theatre and asked for an offer in writing—T. 2100-2104.

21. In June 1935 Schine made, and the executors rejected, an offer of $159,000 for the Palace theatre—T. 2103-2110, Ex. 688.

22. The executors advertised the property for sale at a public auction, to be held on April 20, 1936 in their attorney's office in Lockport. There were present at the sale Mr. Warner Thompson, attorney for Dipson, Mr. Robson, Mr. Fogle, attorney for the executors, Mr. Schine, Mr. Osborne, Mr. May and Mr. Dipson. The property was sold to Mr. Osborne for $37,600, assumption of a $90,000 first mortgage, operating loss of $8902.37, advances for interest and taxes $13,700.20, and interest on various items of $1225.22, making a total of $151,427.79—T. 2112-17, Ex. 690.

23. The bidders at the sale were Mr. Osborne, Mr. Dipson's righthand man, and Mr. Schine—T. 2113, 2117.

24. The sale of the theatre to Mr. Osborne, pursuant to this bid, was completed on May 20, 1936—T. 2118, Ex. 691.

25. On June 16, 1936 Warner Thompson, attorney for Dipson and Osborne, talked with Willard S. McKay, as attorney for Schine, pursuant to the request of Mr. Dipson—T. 2124. Mr. Thompson testified to the conversation as follows: I told Mr. McKay that we had a telephone conversation with Mr. Dipson, that he had notified us that he had had discussions with Mr. Schine in reference to making an arrangement between them for the theatres in Lockport, that we understood—we had been told that Schine had offered $200,000 for the theatre, which had been re-

[fol. 4801] jected; that they had thereafter discussed a pooling arrangement whereby all theatres in Lockport would be combined; the Hi-Art would be closed; rent would be paid to Dipson for the Palace theatre and to Schine for the Rialto, in an amount to be agreed upon; that thereafter profits each year, up to a sum of approximately $50,000, should be divided 65% to Schine, 35% to Dipson, and above that 50-50. That Schine should have the management of all theatres and Dipson and Schine each to have 50% of the stock of the new corporation. Mr. McKay stated first that of course they were not at all afraid of this action which the Reliance Theatres had previously brought, that in their opinion our chances of success were nil. McKay stated that Schine had two theatres in Lockport, and that he absolutely required the number of pictures that he bought; that he actually used, played them, and paid for them; that he did not believe any court would interfere with that arrangement. He said, however, that it would be very expensive to defend the suit; that also, under the present conditions in Lockport, neither Schine nor Dipson were able to make as much money as the situation warranted. That if they got together both would make increased profits in the future. That for the purpose of settling the suit and increasing the profits in Lockport they were willing to enter into a pooling arrangement, whereby the Hi-Art would be closed, the Rialto and Palace theatres operated, management thereof to be exclusively in Schine's hands, because of his superior buying position; that rental was to be paid for both the Palace and Rialto theatres, respectively. No definite basis of rental was discussed, except that it was suggested that rental should be based upon a fixed return upon the investment in each theatre. Mr. McKay further said that he understood from Schine that Dipson had agreed that Schine could have 65% of the profits and Dipson 35% after payment of expenses and rental, and the rental of the Hi-Art theatre, which was to be closed. He further stated that Dipson insisted upon 50% of the stock in the new corporation, but they did not trust Dipson to any extent whatsoever. Therefore they felt it inadvisable to allow a 50—50 stock division, for the [fol. 4802] reason that at any time Dipson might cause a dissolution of the new corporation, which if it occurred after the better pictures were placed and played in the Palace by Schine's management, might be used by Dipson against

Schine in a subsequent anti-trust suit, in the event pictures were withdrawn from the Palace. That they could not allow this to happen; that if they went into the arrangement they wanted it permanent for at least 20 years. That he did not believe that an agreement on our part not to dissolve would be binding. That therefore, inasmuch as Schine was to have the management and 65% of the profits, it would necessarily follow that he should have at least a majority of the stock. That if Dipson actually physically desired 50% of the stock that could be handled by a voting trust arrangement for all the stock, whereby Schine had the appointment of two of three voting trustees; that if these conditions were satisfactory the deal could be closed in short order. I told him that we would consider the matter, advise with Mr. Dipson, and notify him of our reply. I talked with Mr. McKay on the telephone on June 18, 1936 and advised him Schine's offer was rejected for the reason that Dipson, under the arrangement, would be only a minority stockholder. Mr. McKay replied that he did not believe any other arrangement would be satisfactory, but that he would inform Mr. Schine of our decision. I did not have any further conversation with him. I was attorney for the plaintiff, Reliance Theatres, Inc., in the suit referred to—T. 2130-36.

26. When Mr. Dickinson in the summer of 1933 sought to get the Metro product for the Palace theatre for the next year Mr. Rodgers, the General Sales Manager, informed him that the only reason that they had let him have pictures for the season then about to end was a serious disagreement that they had had with Schine, so that the Palace was the only outlet they had that season in Lockport and that they preferred to go back to Schine for the coming season—T. 4506, 4510, 4511.

[fol. 4803] 27. Dickinson had a franchise of the first run of Columbia pictures for the season 1934-35 and 1935-36—Exs. D-47, D-48, D-49; T. 2008-2010.

28. In January 1934 Dickinson was offered United Artists product on first, second or third run and played a substantial number of United Artists pictures first run in 1934, 1935 and 1936—Exs. D-50 to 107; T. 3013-2014.

29. Charles Dickinson, Jr. had had no experience in the theatre business prior to December 1932.—T. 2002.

30. Dickinson admitted that Schines were regular customers of the 8 major companies.—T. 2004-5.

31. Sidney Samson, Buffalo Branch Manager of Fox, offered Dickinson Fox pictures on second run and was turned down because of price—T. 2052.

[fol. 4804]

MALONE

Pop. 8743

1. In September 1926 Schine became the lessee of the Malone theatre, formerly the Grand, 800 seats, later enlarged to 1400 seats, and of the Plaza, 610 seats, and in April 1937 became owner of the Malone, at a cost of $151,800, to which Schine added improvements at an additional cost of $106,000—Int. Ans. 17-A, p. 6, T. 3290-1.

2. In the sumer of 1935 Michael Boumansour, the lessor of the Plaza, received a letter, after which he went to see Mr. May in Gloversville, who told him that the Plaza was condemned and they would discontinue the payment of rent. The rent was paid for the ensuing year—T. 3292-95.

3. Boumansour remodelled the Plaza in 1936 and spent $20,000. When he opened it in November 1936 he had sufficient first run pictures and he did not consider using second run until later—T. 3296, 3404.

4. On Febuary 4, 1937 Boumansour informed Richard Struewe, a salesman for Warner, that he intended to go to a second run policy on May 1, 1937, and Struewe offered him 60 pictures of the 1936-37 season second run, and Boumansour said that he wanted only 30, and Struewe then offered him 30 pictures of the 1935-36 season but Boumansour said that he would not consider any proposition except a 30-picture deal of the 1936-37 season—Ex. D-137, T. 4429.

5. Boumansour signed his first application for second run pictures on June 14, 1937 for the 60 Warner-First National pictures which Struewe had offered him on February 4, 1937, and this contract was approved June 29, 1937 before Boumansour's letter of June 30, 1937 to the Department of Justice—Exs. 863, 909, T. 3393, 3397, 3413, Id. Ex. 857.

[fol. 4805] 6. Boumansour may have dated some pictures under this contract on the same day he signed, and he

remembered that of the pictures called for in the contract he played about 6 or 8 pictures a week—T. 3392, 3473.

7. On the same trip to Albany on which Boumansour signed this contract, he went over and showed the contract to the Paramount branch manager and Paramount sold him some second run and he also showed it to the Metro manager and he got some Metro second run—T. 3326-3328.

8. The second run pictures which Boumansour bought under the contract, Ex. 863, in June 1937 had mostly all been played first run—T. 3472, 3473.

9. After Boumansour instituted his second run policy he announced from the stage to patrons that it was no use going to the other theatre in town, since the pictures shown there would be coming along soon in his house—T. 3418-3419.

10. Some time between December 1936 and May 1937, and before May 6, 1937, the Albany branch manager for Fox informed Boumansour that if he would buy 100% product, Fox would consider the deal and advise Boumansour immediately—T. 3402, 3404, 3483, 3486, 3487.

11. After Boumansour had begun cutting admission prices (T. 3417) and the Malone theatre had followed with reductions, Boumansour saw George Lynch in his office at Malone in the presence of Arty Newman. Lynch said that they were both working their heads off and not getting anywhere, and that it would be better for both if he leased his theatre to Schine. Boumansour said that he would, and stated his terms. Lynch said that he had to call Myer Schine in Florida and then came back and said he had agreed to the terms of rent $8600 a year and Boumansour's services for one year at $70 a week—T. 3372-3376.

[fol. 4806] 12. The lease which Boumansour made was dated February 14, 1941, pursuant to the agreement of January 21, 1941, providing that Boumansour should not compete within twenty miles of any Schine town—Exs. 81, 82, T. 3380, 3381.

13. Boumansour continued as manager for about two years, during which the Plaza was operated three days a week—T. 3377-3378.

14. The admission prices at the Malone theatre during

this period were 30¢ orchestra and 20¢ balcony and at the Plaza 25¢—T. 3378-9.

15. Boumansour notified the Department of Justice that he had disposed of his theatre as planned and that everything was satisfactory—T. 3382-84, Ex. D-133.

16. Except for a short period in 1922 and possibly again prior to 1930, Boumansour had not operated the Plaza prior to 1936 but the competition was so severe that he decided to lease the theatre to Meehan in 1923—T. 3414-3415.

17. Prior to the date of the opening of the Plaza theatre and thereafter the Malone theatre double featured major pictures during each week, with 3 to 4 changes per week, playing single features only on weekends—T. 3311, 3416.

18. Boumansour advertised 2-for-1 tickets, or a 12½¢ admission price with a coupon, practically at the outset of his operation of the Plaza theatre at a time when he was playing first run pictures. Soon after this he instituted dish give-aways, each patron receiving a dish costing 10¢ with each admission, and he also instituted a game known as "Lucky" for the use of which he was granted an allowance by the film companies—T. 3416-20.

[fol. 4807] MASSENA

Pop. 11,328

1. In August 1926 Schine became lessee of the Massena theatre, 1111 seats, and the Rialto theatre, and expended in the improvement of the Massena $72,500—Int. Ans. 17(A), p. 6; Ex. D-150.

2. Schine gave up the Rialto lease in 193[illegible] the present operator acquired it—Int. Ans. 17(A), p. 6.

[fol. 4808] MAYSVILLE

Pop. 6572

1. In June 1938 Schine became the lessee of the Russell theatre, 700 seats, and in January 1939 became interested to the extent of 60% in the Washington, 500 seats, and the Hollywood, 300 seats. S. Kaplan had an interest of 40% in these three theatres until December 7, 1940—Int. Ans. 17(A), p. 17.

[fol. 4809] MECHANICSVILLE

Pop. 7449

1. From April 1937 Schine had a fifty percent interest in and did the film buying, first at $100 a week and then at $200 a week in the aggregate for four theatres, the State at Mechanicsville, the Capitol at Ballston Spa, the Capitol at Whitehall, and the Ritz at Granville, and expended in the improvement of these four theatres approximately $50,000 —Int. Ans. 17(A), p. 11, 17(B), p. 1; Ex. D-150.

[fol. 4810] MEDINA

Pop. 4359

1. In September 1937 Schine became interested in 50% of the lease of the Princess theatre, 350 seats, Yudelvitz and associates retaining 50%. In April 1939 the Schine and the Yudelvitz interests became interested in 50% of the lease of the Temple theatre, 857 seats, the other 50% being retained by Essick and Fine, who also acquired a 50% interest in the lease of the Princess, so that in April 1939 and thereafter the interest in the two leases stood Yudelvitz 25%, Schine 25%, and Essick and Fine 50%—Int. Ans. 17(A), p. 13; T. 1847.

2. Yudelvitz and Willis were lessees and operators of the Princess theatre, with all the first run product they wanted, when by January 1, 1937 they had learned that Fine and Essick with a circuit of some 29 theatres, an independent circuit, that is, not connected with any producing company, were proposing to come into Medina in opposition to them—T. 1870, 1883.

3. On March 18, 1937 Yudelvitz and Willis entered into an agreement with Schine to come in with them and to build a new theatre—Ex. D-46, p. 1901.

4. At almost the same time the Masonic Lodge of Medina entered into the reconstruction of their building with a theatre in it. In March 1937, they wrote to Schine asking him not to go ahead with the plan to build a new theatre in Medina. The Masonic Lodge under date of January 18, 1938 leased to Essick and Fine—T. 1861, Ex. 648, Ex. 1006 same as Id. Ex. D-45.

5. The new theatre, the Temple, alone was ample for the town, but the Princess was not—T. 1876, 1885.

6. Before the new theatre, the Temple, opened Yudelvitz was playing Metro, Paramount, Fox, RKO, and Republic [fol. 4811] pictures because with the Western stars, Ken Maynard and Gene Autry, he wanted to play Republic on Fridays and Saturdays, although he was not forced to do so from any lack of product—T. 1888, 1889.

7. When the Yudelvitz 25%, Schine 25%, Fine and Essick 50% contract was made Schine and Yudelvitz contributed the lease and equipment of the Princess and Fine and Essick contributed the lease of the new theatre to the new corporation. After the payment of operating expenses the first $3,000 of profit was to be divided in the above proportions, then the next $1500 of profits went to Fine and Essick to repay the $53,000 that they had invested in the development of the new Temple theatre, and then the remaining profits were to be divided 25% to Yudelvitz, 25% to Schine and 50% to Fine and Essick—T. 1892-84, Ex. 648.

8. Schine said nothing to Essick and Fine by way of threat—T. 1921.

9. In the operation of the Medina Temple theatre the town has been very well served and the worth while pictures of all the distributors from time to time have been exhibited there—T. 1922.

10. The admission prices depend on the product, what the pictures are, what company produces them, and so on—T. 1924.

11. The cost of pictures to the exhibitor is one of the things which Essick would take into consideration in determining the price of admission—T. 1925.

12. Yudelvitz and Schine in the spring or fall of 1937 had expended in the vicinity of $15,000 in the improvement of the Princess theatre, and the contract shows that this was not to be paid back and there was no separate agreement to pay it back—T. 1926, 1928, Ex. 648, 648A.

[fol. 4812] 13. Essick did not ask Loew's for product until after he learned that Schine had entered the picture, and subsequently he made no effort to get Metro, Paramount, Fox, and RKO—T. 1913.

14. At the time the contract between Warner and Schine was approved by the general sales manager of Warner on October 27, 1937, he had heard no claim by Mr. Essick or Mr. Fine that Mr. Kalmenson had promised the Warner product to Essick or Fine—T. 4583.

15. When Mr. Essick made his claim in November 1937, Mr. Kalmenson denied that he had made any such promise and this denial was brought to the attention of the general sales manager—T. 4583.

16. In view of the controversy the general sales manager secured a reduction of the number of pictures to Schine to one half of the product and licensed one half of the product to Essick and Fine, pursuant to his policy to adjust matters in case of a disagreement between customers—T. 4591, 4593.

17. In the conversation which Essick and Fine had with Mooney and Kalmenson regarding Warner product there was no discussion as to terms, season, date of opening of the theatre or other details—T. 1806.

[fol. 4813] MIDDLESBORO

Pop. 11,777

1. Schine became lessee of the Manring theatre, 965 seats, and the Brownie theatre, 412 seats, in January 1939, and the owner in February 1941, at a cost for the Manring of $85,000, to which Schine added improvements at an additional cost of $10,600—Int. Ans. 17(A), p. 17; Ex. D-150.

[fol. 4814] MILFORD

Pop. 4214

In January 1939 Schine became the owner of the Plaza theatre, 1057 seats, at a cost of $62,500, to which Schine added improvements at an additional cost of $50,500—Int. Ans. 17(A), p. 19; Ex. D-150.

[fol. 4815] MT. VERNON

Pop. 10,122

1. Mr. Smoots, the owner of the Vine and lessee of the Memorial, brought the matter of going into Mt. Vernon to Schine's attention and proposed to lease the Vine to Schine

and assign his lease on the Memorial, which was then closed —T. 4120, 4121.

2. At about the same time Mr. Platt, who operated the Lyric, said that he would like to sell Schine the equipment and lease of the Lyric provided he could get a job to manage the theatres in town, and this deal was closed about February 1934—T. 4124.

3. Schine became the lessee of the Vine theatre, 585 seats, and of the Memorial theatre, 1065 seats, in January 1934, and of the Lyric theatre in February 1934, and of the Memorial again at the end of December 1940, and expended in the improvement of the Vine $3300, and of the Memorial $6100—Int. Ans. 17(A), p. 13, 14; Ex. D-150, T. 4126.

4. Schine first made moderate improvements on the Vine and about a year later started making a survey for enlarging the Vine into a modern theatre—T. 4124.

5. The Vine was near the busy part of the Square, a little off the main street, with one floor, seating 585 people, with a high ceiling, but lacking modern appointments and conveniences, and with a very short lobby—T. 4125.

6. The Lyric location was the finest location in the town, right on the Square, near the chief department store. On this site, in April 1938, the new Vernon theatre, 1266 seats, was built. Schine expended on this new theatre an additional $48,600—T. 4125-26, Ex. D-150, Int. Ans. 17(A), p. 13, 14.

[fol. 4816] 7. The Lyric was a very narrow building, one of the first theatres built for motion pictures, with a high ceiling, but only one aisle in the center, with about 4 or 5 seats on each side, and with no lavatory facilities and with a stove in the rear of the theatre, right in the aisle, and a booth projecting right over part of the audience, making the ceiling there very low—T. 4126.

8. The Memorial was on top of a hill, about a block and a half or two blocks from the business section. It was in a county building with county offices and a walkway about 100 feet off the sidewalk. The entrance was just an ordinary door, with no appearance of a theatre, leading to a hall which contains seats and a balcony, and is equipped with a booth and screen—T. 4127.

9. The Lyric site was inadequate for the new Vernon theatre, and it was necessary to buy additional land—T. 4128.

10. The new Vernon theatre, completed in April 1938, is a modern fireproof constructed theatre with a wide marquee in front, no stores, a large lobby, and in the interior decorated in very modernistic style, with the finest seats obtainable, has all the other equipment and a fine mezzanine furnished attractive and comfortable, with fine public spaces for men and ladies upstairs and downstairs. The $48,600 spent by Schine for equipment was in addition to the money expended by the owner in building the building at a cost of from $120,000 to $130,000—T. 4129.

11. Emerson W. Long obtained a lease of the Memorial at the end of 1934 and operated it until December 1940—T. 199.

12. In 1937 Mr. Custer, followed by Mr. May, tried to work out a deal with Long or build a new theatre and advised a sale. The visit was a friendly one and the advice given was of a friendly nature with no threats involved—T. 154-6.

[fol. 4817] 13. Before the new Vernon was opened, Long was getting adequate product and played to crowded houses—T. 236, 256, Exs. D-1, 2, 3, 6, 9.

14. Long was interested in first run product of which he had all he wanted, and he turned down offers of second run product—T. 254, 260.

15. When Long requested first run product in December 1934 and was told it was sold he did not consider it unusual at that date—T. 218-220.

16. Long operated the only theatre in Cadiz, Ohio, where he also had a closed theatre, and he tried to use the pressure of this situation to get product for Mount Vernon—T. 200, 205, 235, Ex. D-2-9.

17. At the conclusion of Long's lease in 1939, he was awarded a new lease although the owners received a better bid from Schine—T. 336.

18. On December 18, 1940 a lease was awarded to Schine, after Long was given first opportunity to renew his lease—T. 333, 337-340.

19. From 1940 on the conditions in Mt. Vernon improved —T. 345.

[fol 4818] NEWARK

Pop. 9,646

1 In October 1924 Schine became the owner of the Capitol, 1210 seats, at a cost of $20,000, to which Schine added building and improvements at an additional cost of $143,700, and in April 1926 the lessee of the Crescent theatre, which became obsolete and unusable—Int. Ans. 17(A) and 18, p. 5.

[fol. 4819] NORWALK

Pop. 8211

1. Schine became interested to the extent of 66⅔% in the lease of the Forum, 537 seats, in July 1935 and as owner of the Moose, 838 seats, in December 1936, and as owner of the Norwalk in March 1940, completed and opened August 13, 1941 at a cost for land of $16,350, to which Schine added building and improvements at an additional cost of $123,100. The improvements to the Forum cost $17,500—Int. Ans. 17(A), p. 14; Ex. D-150.

2. The Forum was completed and opened with all new equipment in December 1934, T. 472, 936.

3. The Moose was built about 1904. The only other theatre which had been in the town had been acquired in 1926 and closed in 1931 by the operators of the Moose, T. 970-971.

4. Schmertz gave Felter the first opportunity to purchase ½ of the Fox product of the 1935-36 season and gave him 15 days to decide. Felter talked to Schmertz two weeks later and was told the product was still open and that he could have 3 more days. After the 3 days expired he called Schmertz and was then told that the product had been sold—T. 956-959.

[fol. 4820] NORWICH

Pop. 8694

1. Schine became owner of the Colonia theatre, 1045 seats, in November 1921, at a cost of $80,700, to which Schine added improvements at an additional cost of $29,-

500, and Lessee of the Strand from 1922 to 1930—Int. Ans. 17(A) and 23, p. 7; Ex. D-150.

2. The Colonia is a large complete theatre, with a large stage, good ventilation, good seats, nice entrance, and is housed in an extraordinary substantial building which was built by local citizens' subscriptions, with no theatre approaching equality to it within 50 miles except that at Binghamton, 40 miles away. After the major improvements in 1938 it was as modern as any theatre could be, with fine cushion seats with springs, ventilating system, finely decorated, with rather an attractive marquee with plenty of lights in front, and more important, the projection and sound was of the very latest type, and fine carpets, an outstanding theatre—T. 4056-68.

3. The Strand in 1929 was a much smaller theatre with no stage, a low ceiling and a projection booth on the ground floor, so that it was necessary to walk around it to enter the theatre, and was known as a glorified store show—T. 4057-58.

4. The Colonia was operated from the inception as a first run house—T. 4059.

5. The Strand was operated by Schine prior to 1929, as it had been operated by the previous exhibitor, as a Western and secondary feature house for action and Western pictures. The latter have not too logical stories and thrilling incidents, with a better appeal, in such places as Kentucky, than the so-called big stars—T. 4059-60.

6. William C. Smalley, operator of the Smalley Circuit, with eleven theatres in 1932 and fourteen in 1942, began to [fol. 4821] operate the Strand, built in 1919, with 740 seats after remodelling on November 4, 1930—T. 3669, 3584, 3681.

7. The Strand was not equipped for sound until 1930 and was a brand new operation in sound—T. 3690.

8. Up to this time the Colonia was the only outlet for sound pictures in Norwich and had Metro, Paramount, Fox, Universal, some Columbia, some United Artists—T. 3692-93.

9. In March 1932, the Strand burned and it was not re-

opened until November 1932, after the beginning of the release year 1932-33—T. 3586, 3694-3695.

10. Smalley began cutting admission prices as early as 1934 and continued to do so and advertised prices of 10¢ and 20¢ as late as January 19, 1942—T. 3718-3732, Exs. D-145, 146.

11. Smalley was getting such first run pictures as he was willing to buy from Columbia as late as December 1940 at $25 each—T. 3742, 3705-8, Exs. D-141, 142, 143, 144.

12. He was getting second run pictures throughout the whole period from all distributors—T. 3744.

13. The reason that the distributors sold to the Colonia was that that theatre was a satisfactory customer—T. 3641.

14. The distributors in negotiating with Smalley ordinarily negotiated for his entire circuit, striving to sell as many pictures as possible in his closed towns of which he had 12 as compared with 2 open towns, Norwich and Johnstown—T. 3637.

15. Smalley told the distributors that he would not buy pictures for his closed towns unless they sold him for Norwich—T. 3677.

[fol. 4822]

OGDENSBURG

Pop. 16,346

1. In September 1926 Schine became lessee of the Strand theatre, 1311 seats, and of the Pontiac theatre, 460 seats, and later owner of the Strand at an original cost for the Strand of $137,000, to which Schine added new building, equipment and improvements at an additional cost of $155,800, and improvements to the Pontiac, formerly the Star, of $8700—Int. Ans. 17(A), p. 7; Ex. D-150.

2. Lawrence Carkey testified that between July 1 and July 15, 1940 second run product was available, unsold in Ogdensburg, and he saw Jack Armm of Columbia, Richard Haas of Paramount, Richard Struewe of Warner, George Tucker of RKO, Gene Vogel of Metro, Jerry Spandau of Universal, Fred Sliter of Fox, and each said that it was available—T. 3554-56.

3. Carkey testified that he saw these salesmen again between August 15 and August 30, 1940 and each said that

the second run Ogdensburg had been sold to Schine except that Spandau of Universal offered to sell him second run, and that Carkey told him that he would see him in a couple of days, that he wanted to have two major companies, and that he called in Jack Armm of Columbia and Jack Armm informed him that second run had been sold to Schine, and thereafter he had no further negotiations with any of the film companies for second run—T. 3560-64.

4. On September 4, 1940 the Common Council of Ogdensburg voted, authorizing a lease of the city market to Carkey —Ex. 879.

5. Carkey did nothing toward converting this into a theatre—T. 3545.

6. On September 17, 1940 a blue print sketch was prepared—T. 3547, Id. Ex. 880-881.

[fol. 4823] 7. On September 30, 1940 a proposed lease was submitted, which Carkey never signed—T. 3550-51.

8. Armm did not tell Carkey that second run had been sold to Schine. Armm told Carkey that Schine did not have a second run and there was no reason why Carkey could not have second run and that he could have it at a price not stated, but to be determined after he opened up and a check of the pictures showed what they were worth—T. 4435-36.

9. Later, when Armm met Carkey in Norwood and suggested going to look at the market place in Ogdensburg, where he was to build a theatre, Carkey said, I guess we will have to forget about it temporarily because Mrs. Shapiro, who was to finance it, has backed out, that the decorator who was doing his work and who was going to give him the money to fix it up with, and he had backed out. Thereafter on later visits, when they talked about Ogdensburg, Carkey told Armm that there was nothing doing, he could not get the finances—T. 4437, 4439, 4440.

[fol. 4824] ONEONTA

Pop. 11,731

1. Schine became the owner of the Strand theatre in October 1919, of the Oneonta theatre, 1217 seats, in November 1922 and of the Palace theatre, 866 seats, formerly the

Maxie, by lease in March 1923 and deed in September 1927, at an original cost for the Oneonta of $130,000, and which Schine improved at an additional cost of $24,300, and at an original cost for the Palace of $161,800, and which Schine improved at a cost of $4500—Int. Ans. 17(A), p. 7; Ex. D-150.

[fol. 4825] OSWEGO

Pop. 22,062

1. Schine became owner of the Strand, 950 seats, the Capitol, 696 seats, and lessee of the Richardson in September 1922, and owner of the State in November 1934, and of the land for the Oswego, 1704 seats, in June 1937. The Oswego theatre was completed January 22, 1941. The original cost for the Strand was $75,000, to which Schline added improvements at an additional cost of $2,000. The original cost for the Capitol was $60,000; to which Schine added improvements at an additional cost of $35,000. The original cost for the land for the Oswego was $42,500, above which Schine built and added improvements at an additional cost of $249,800—Int. Ans. 17(A), p. 7; Ex. D-150.

[fol. 4826] PARIS

Pop. 6,697

1. Schine became owner of 97% of the stock of Phoenix Amusement Company, lessee of the Bourbon theatre, 634 seats, in November 1936, and added improvements at a cost of $15,000. Schine became owner of the land for the Paris in December 1937 at a cost of $24,000. The theatre was completed in December 1939, 932 seats, at a cost for building and improvements of $71,000—Int. Ans. 17(A), p. 17; Ex. D-150.

2. Early in October 1937 the Phoenix Amusement Company, pursanut to an ordinance dated October 7, 1937, received a license dated October 7, 1937 to erect and operate a new theatre—Ex. D-153, 153-A, T. 4148. Schine proceeded to have plans drawn, got bids in the spring or summer of 1938 and completed the new theatre in 1939—T. 4149, 4150.

3. On November 2, 1938 Harry Schwartz obtained a lease of property in Paris, about four months after he knew of the proposal for the new Schine theatre—T. 2905, Ex. 823.

4. In November 1938 Lazar asked Schwartz if he had not seen the sign on the lot Schine had purchased some time ago and that they were going to build a new theatre on it, and Schwartz told him that he had, and Lazar said that they had every intention of building a theatre in Paris and were not decided on just what type or what size, and that is why they had not begun earlier, and that he felt that Schwartz was making a mistake in building in competition with them, and Schwartz told him that he did not think so or he would not have signed a 20-year lease on the main corner of the town, and that he felt that he had the best location in Paris and that the theatre would be self-supporting. Lazar asked him if he would not come to meet him at the Lafayette Hotel, and Schwartz said that he would be glad to do so and went later in the day to the Lafayette Hotel—T. 2915, 2916.

[fol. 4827] 5. There, Lazar said that he did not feel that Paris could support three theatres and that as long as they had been in Paris operating a theatre and had anticipated building a new larger theatre, he could not quite understand what would prompt Schwartz to go into the town as competition. Schwartz repeated that his location was the better of the two and that he was not afraid of competition. Lazar asked him to think things over, that he felt that Schwartz was making a great mistake and would lose plenty of money, and that, if Schwartz cared to, Lazar would take this lease off his hands. Schwartz said for how much, and Lazar said, are you trying to hold me up, and Schwartz said I am not trying to hold you up; you called me up and I did not come to see you or call you up. Lazar said well, I believe that Mr. Schine would be willing to take this lease off your hands and relieve you of that obligation, and Schwartz said that he was not intending to give up the lease and that he was going ahead with the theatre, and that ended the conversation, T. 2916, 2917.

6. After Schwartz began construction, Lazar called Schwartz on the telephone and asked whether he was still determined to build or whether he was just starting operations to stop within a week or so, and Schwartz told him that he intended to go ahead, had plans drawn by a theatre architect and a contract had been signed with the construction company to build the theatre, and he fully intended to build it. Lazar told him that his offer was still good, and Schwartz told him that he did not believe he would care to sell the theatre or assign the lease—T. 2918.

7. Three weeks later, after the side walls were already constructed, Lazar called Schwartz on the telephone and asked Schwartz to stop construction and come to see him about a deal. Schwartz saw Lazar at the Lafayette Hotel. There they went over the same discussion and Lazar said he was willing to enter into a deal for the Opera House property in Lexington, Schwartz' Paris theatre and a theatre [fol. 4828] that Schwartz was operating in Frankfort, Ky. At this time Schine was building in Paris (T. 2919), and they made a deal and Schwartz stopped construction about August 30, 1939—T. 2919-20.

8. The agreements are dated September 15, 1939. They contain a provision that the assignors will not be interested for fifteen years in the motion picture, theatrical or amusement business in any city or town in the State of Kentucky, in which the assignee or any of its affiliated or associated companies are now engaged, except that the assignor may invest in stock and securities listed on any recognized stock exchange, and that Schine pay to the assignor $5,000 for the Paris leases and assume liabilities and that Schine pay to the lessor $22,500, for the Opera House lease, Ex. 823, T. 2921-27, Ex. 828, T. 2924-2925.

9. Before the Opera House was leased, Schine's first run houses in Lexington were charging 40¢ in the evening and 25¢ at matinee, and the second run house, the Strand, was charging 25¢ at night and 15¢ in the afternon. This was not changed from what it had been, except that prices had been reduced in the summer months of 1937-38, but not of 1939. Starting in 1934 the State was charging 10¢ matinee and 15¢ in the evening, and before that it was a 10¢ house and the Ada Meade was charging 10¢—T. 2927-28, 2933-34.

10. About six months after Schwartz leased the Opera House to Schine the admission price was made 16¢ for the matinee and 22¢ at night, and the prices at the other Schine houses were not raised until, subsequently, with the increase in taxes, the prices were raised a few cents, not very much—T. 2928-29.

11. Paris was not big enough for more than two theatres—T. 2934.

[fol. 4829] 12. Schwartz in his dealings with the Schine interest was met only with courtesy and fair discussion of

negotiations. There is nothing in the record to show intimidation and no threats were made. The two agreements were a good deal for Schwartz and he got not only the money consideration, but a new lease of the Opera House running to Schwartz as lessor at a fair and satisfactory rental—T. 2934-36.

13. At the time of the agreements the only Kentucky towns that Schine was in were Middlesboro, Corbin, Pikeville, Paris, Richmond, Lexington and Maysville—T. 2937.

14. The Paris theatre is a very fine theatre—T. 2938.

[fol. 4830] PENN YAN

Pop. 5,308

1. Schine became the owner of the Elmwood theatre, 716 seats, in September 1936, at a cost of $110,000, to which Schine added improvements at a cost of $10,000—Int. Ans. 17(A), p. 8; Ex. D-150.

[fol. 4831] PERRY

Pop. 4,486

1. Schine became lessee of the Auditorium, 652 seats, in October 1936—Int. Ans. 17(A), p. 8; Ex. D-150.

2. Schine bought the Davis property a little below the hotel, at a corner on the Main Street, in July 1935—T. 4147, 2572.

3. In July 1935 Mr. May called on John C. Herzberger, the operator of the Auditorium theatre, and introduced himself and said that he had just closed a deal with Porter Davis, buying a lot for Mr. Schine, on which they were to build a theatre seating 1,000 persons and costing about $100,000 and that he hoped that they would be friends—T. 2570.

4. In August 1935 Herzberger met Schine at the Seneca Hotel in Rochester and Schine offered Herzberger $5,000 for his lease from the Town of Perry of the Auditorium. An agreement was signed, subject to the approval of the Town Board to the sale of the lease, and to expire on September 1—T. 2577.

5. In August 1935 the Town Board wanted Herzberger to stay and would not let him sell the lease—T. 2578.

6. Schine received the blue prints for a new theatre in Perry, dated Septmber 1935, and specifications therefor, and the time fixed for receiving bids for the construction was October 4, 1935—T. 4146-47; Id. Ex. D-152.

7. In September or October 1935 Mr. Osborne of Dipson & Osborne came to Mr. Herzberger several times about taking over his lease for more money than Schine had offered, and he made a deal with them and continued to manage the theatre for a year—T. 2582, 2579.

[fol. 4832] 8. Dipson improved the theatre at a substantial expense of about $13,000, that made the theatre a satisfactory theatre and removed any occasion for having another theatre built in the town. Before this improvement the theatre was not at all a modern theatre but had been built in 1898 for stage performances. After rebuilding it had about 700 seats, as Dipson reseated the theatre—T. 2584-86.

9. Dipson and Osborne sold their lease to Schine and Schine made additional improvements to the theatre at a cost of $7500—T. 2580, Ex. D-150.

10. No other theatre has been built in Perry—T. 2580.

[fol. 4833] PIKEVILLE

Pop. 4,185

1. Beginning in November 1938, Schine bought and booked for the Liberty theatre at a fee of 5% of the gross receipts and in August 1939 Schine became the lessee of this theatre, 700 seats, and expended in the improvement of it $2800—Int. Ans. 17(A), p. 17.

[fol. 4834] PIQUA

Pop. 16,049

1. In May 1931 Schine became the lessee of the Piqua theatre, 958 seats, the Miami, 712 seats, and the Bijou theatre, 375 seats, and improved them at a cost in the aggregate of $18,500—Int. Ans. 17(A), p. 14; Ex. D-150.

[fol. 4835] RAVENNA

Pop. 8,538

1. In December 1937 Schine became the owner of the Ravenna, 871 seats, and the Ohio, 499 seats, then closed,

at an original cost for the Ravenna of $128,500, to which Schine added improvements at an additional cost of $9,500, and at an original cost for the Ohio of $33,000, to which Schine added improvements at an additional cost of $44,500 and reopened it in June 1941—Int. Ans. 17(A), p. 14, 18, p. 14; Ex. D-150.

[fol. 4836] RICHMOND

Pop. 7,335

1. In November 1936 Schine became owner of 97% of the stock of the Phoenix Amusement Company, the owner of the Madison, 987 seats, and lessee of the State, 666 seats, and lessee of the Alhambra, at an original cost for the Madison of $75,000, to which Schine added improvements at a cost of $5,500—Int. Ans. 17(A), p. 17; Ex. D-150.

[fol. 4837] ROCHESTER

Pop. 324,975

1. Schine became the owner of the Grand, 834 seats, in August 1925; the Liberty, 1256 seats, by lease in October 1926 and deed in February 1939; the Riviera, 1508 seats, by lease in October 1926 and deed in April 1927; the State, 1062 seats, by lease in January 1926 and deed January 1928; the Cameo, 1258 seats, in May 1936; the Madison, 1381 seats, in February 939; the Monroe, 1186 seats, in February 1939; the West End, 832 seats, in February 1939; and the Webster, 1099 seats, in September 1940; and the Plaza in September 1940; and the lessee of the Dixie, 892 seats, in August 1932; and of the Lake, 840 seats, in January 1936. The original cost of the Grand was $95,000, to which Schine added improvements at an additional cost of $19,000. The original cost of the State was $145,000, to which Schine added improvements at an additional cost of $9,000. The original cost of the Riviera was $304,100, to which Schine added improvements at an additional cost of $7500. The original cost of the Cameo was $60,000, to which Schine added improvements at an additional cost of $25,500—Int. Ans. 17(A), p. 8; Ex. D-150.

2. The price paid by Schine for the Madison, Monroe, Liberty and West End properties was as much as Fenyvessy paid for them—T. 2415, 2481-2484.

3. In 1927 Mr. Tishkoff and Mr. Schine had a conversation informally in the lobby of the Seneca Hotel. Schine asked him whether it was true that he and his associates proposed to build a theatre in the neighborhood of the State and Plaza, and Tishkoff said that it was true. Schine asked him whether he thought the location was suitable for a third theatre, and Tishkoff said that he didn't know, that his partner got into it and he went along. Tishkoff said why don't you come up to my office tomorrow and I will have my associates there and see if we can't work out some-[fol. 4838] thing whereby we might have a partnership in the theatres—T. 4088.

4. The next day they met in Mr. Tishkoff's office and Schine told the group that the neighborhood was already overseated and that the Plaza had just been remodelled and that there wasn't room for a third theatre. They talked the possibility of a partnership, and Schine said that he wouldn't go into the partnership, that they were overseating a neighborhood and that if they really wanted to build a theatre there were many other neighborhoods where a theatre was needed, but they said that they owned a lot and were going ahead, and Schine said that there would be no more sense in it than in building a theatre near the Murray. Nothing was said in substance that if they persisted Schine would put in a theatre next to the Murray, and there was no talk about the possibility of Schine's building another theatre near the Murray or about buying power if a theatre was put up near the Murray. The possible harmful effect on the Plaza theatre had been considered by Tishkoff and Fogel—T. 4089, 4093, 4090, 3242.

5. Later Tishkoff and Fogel told Schine that they had gone ahead and that the theare was reaching completion and that they thought it would be of advantage to form a partnership of a half interest in the lease of the property which they and their associates owned, at $20,000 a year, and Schine said that he would think the matter over—T. 4091.

6. They met again and they said that they were willing to form a corporation to take a lease of the Webster with $20,000 to be put up as advance rent, $10,000 of it by Schine, and Schine would have to take half of the product run first in the State and give them, and Schine would get a contract

to buy the pictures at 5% of the gross receipts, with the operation in the hands of Mr. Fogel, and after some weeks Schine agreed to that—T. 4092.

7. The State theatre had been built about a year before —T. 4092.

[fol. 4839] 8. The first run theatres in downtown Rochester are Loew's Century, Palace, Regent and Temple—T. 2217.

9. Loew's was operated by Loew's, the Century and Regent by Comerford and Paramount, the Palace and Temple by RKO—T. 2218-19.

10. The location of the theatres in Rochester and the distances apart appear on Ex. D-112, T. 2423-32, 2439-44.

11. In 1939 Mr. Fenyvessy, the father of the witness Chester Fenyvessy, after operating theatres in Rochester for thirty years and at the age of eighty-four, desired to dispose of his theatre interests and conducted negotiations which resulted in a deal with Mr. Schine for the sale to him of the Madison, Monroe, Liberty and West End theatres—T. 2433.

12. The unrest in Europe affected the supply of suitable foreign language and other product theretofore obtainable for the Little theatre in Rochester, and the pictures licensed to other theatres in Rochester could not be licensed on the same run to this theatre—T. 2508, 2516.

13. There was nothing abnormal about the sequence of runs or clearance licensed by the respective distributors to the respective theatres—T. 2384-2555.

14. Schine disposed of the Webster and of Schine's interest in the Plaza theatres in June 1942, following the consent order entered May 19, 1942.

15. When the Madison was obtained by Mr. Fenyvessy, father of the witness Chester Fenyvessy, in 1929, Schine was already operating the Riviera, Liberty, State and Dixie on the prior run—T. 2484-85.

16. From the early thirties, the Liberty was a source of revenue to Mr. Fenyvessy, the father, who bought it subject to the lease to Schine and continued to lease it to Schine—T. 2484-85.

17. The Fenyvessy theatres took clearance over all the Schine theatres in Rochester except the Riviera, State, Dixie and Liberty—T. 2439.

[fol. 4840] SACANDAGA PARK

1. Schine has bought and booked for the Rustic theatre since the summer of 1937 at a fee of $250 a year—Int. Ans. 17(B), p. 4.

[fol. 4841] SALAMANCA

Pop. 9011

1. In October 1924 Schine became the lessee of the Andrews theatre, 735 seats, and in 1927 bought the land on which the new theatre was subsequently built. The original cost of the land was $24,300, to which Schine added a building and improvements at an additional cost of $164,300—Int. Ans. 17(A), p. 9; T. 4107, 3359, Ex. D-150.

2. Under an agreement with Fox-Metropolitan, Schine undertook to construct a new theatre on its land in Salamanca and to lease it to Fox-Metropolitan. This agreement was terminated and the theatre was not then erected—Int. Ans. 27.

3. Schine took the new building project up with the architects in mid-summer of 1938 and sent blue prints of the land to the architect on August 23, 1938. The plan to complete the theatre in 1939, was held up by lack of materials which could not be obtained, and the completion and opening was in August 1942—T. 3358, 4202, 4206, Id. Ex. D-151.

4. The new theatre is a very lovely theatre, air conditioned, with modern equipment, with about 1200 seats—T. 3363.

[fol. 4842] SALISBURY

Pop. 13,313

1. Schine became the lessee of the Arcade, 914 seats, and the Wicomico,601 seats, in September 1938, and the owner of the Wicomico in July 1940, and the lessee of the Ritz, a colored theatre, 462 seats, in September 1940, at a cost for the Wicomico of $26,000, to which Schine added im-

provements at an additional cost of $7600, and added improvements to the Arcade at a cost of $29,300—Int. Ans. 17(A), p. 18; Ex. D-150.

2. Bernard Ulman is a manufacturing pharmacist in Baltimore and President of the corporation that operates the Ulman theatre and the New theatre in Salisbury—T. 2951.

3. In May or June 1941 Mr. May came to see Mr. Ulman and asked for a lease to Schine of his two theatres and Ulman asked him for an offer, and May requested figures of the business they were doing, upon which an offer could be based. Ulman did not give him any figures and May said he would come back later—T. 2953.

4. The Ulman theatre burned in June 1941—T. 2953.

5. Shortly thereafter May came to see Ulman. Ulman informed him that he was going to rebuild. May said that he did not think it would be advisable because there would be difficulty in getting pictures on account of the war situation, and the theatre was not needed in the town—T. 2953.

6. Thereafter Lee Insley, Divisional Manager of the booking office for booking pictures for theatres from the Washington exchange, Maryland and Delaware, with such duties as are assigned by the executive office, came to see Ulman and said that Schine was in a better position to run the theatre than he and also they were in a better position to buy pictures—T. 2954-55.

[fol. 4843] 7. The Ulman theatre always had a split of Paramount product prior to the 1938-39 season and again in the 1939-40 season—T. 2941-2950.

8. There are five theatres in the town, of which the Arcade, Wicomico, Ulman and New theatres play first run product. At the time Schine acquired the Arcade it was playing the first run product of Warner, Metro and Columbia, and at the time Schine acquired the Wicomico it was playing the first run product of RKO and Universal—T. 2941, 2949, 2950-1.

[fol. 4844] SARANAC LAKE

Pop. 7838

1. In March 1927 Schine became the owner of the Pontiac, 1218 seats, at a cost of $135,000, to which Schine added

improvements at an additional cost of $165,500—Int. Ans. 17(A), p. 9; Ex. D-150.

[fol. 4845] SEAFORD

1. Mr. Thomas E. Ayers testified that on several occasions in 1938 and 1939 Mr. May and Mr. Insley spoke to him, the operator of the Palace theatre and the Layton theatre and the Sussex theatre in Georgetown, about buying the theatres and he said that he wasn't interested and didn't want to sell—T. 2959.

2. Ayers testified that after Schine acquired the Waller theatre in Laurel in April 1939, Mr. Schine and Mr. McKay and Mr. May said that if he was interested in selling, they would like to make a deal, and he said he was not, and they wanted to know if he would go in as partners with them, and he said that he was not interested, and they said they thought it would be more to his profit if he would go in partners with them because they could secure pictures much cheaper than he could, and at the end he would probably make as much money as if he was by himself, and he told them that he was not interested—T. 2961.

3. Ayers testified that Mr. Insley wanted to know if there was any way it would be possible to make a deal and that it was very foolish not to make one because they have Laurel and are likely with the buying power they had to get the product away from me and I would wind up probably playing Independent companies rather than playing the type of pictures that I was already playing, and he told them that he would have to take that chance, that he still was not interested—T. 2962.

4. Ayers testified that Mr. May the last time he was there asked him if he would not reconsider on making a deal, and he told him no, that he had started to build a second theatre, the Layton, and he said that they would take that house over in connection with the Palace if he would make a deal, and he told him no—T. 2963.

[fol. 4846] SENECA FALLS

Pop. 6452

1. In September 1935 Schine became the lessee of the Strand, 943 seats, and in April 1936 the owner of the Seneca,

and made improvements on the Strand at a cost of $19,500 —Int. Ans. 17(A), p. 9; Ex. D-150.

2. At the time Schine came into possession of the Seneca it was not in condition to operate as a theatre because the equipment had been removed by the former operator—Int. Ans. 17(A), p. 9.

[fol. 4847] SHELBY

Pop. 6653

1. In September 1937 Schine bought a 50% interest in the lease of the Castamba, 749 seats—Int. Ans. 17(A), p. 14.

2. January 23, 1936 Halmer D. Shreffler, operator of the Castamba, wrote Louis Lazar and later was in touch with Lazar, who wanted to make a partnership deal—T. 1113, 1116.

3. After July 3, 1937 and in latter August or first of September 1937, at Shreffler's carriage works, Lazar said that Nick Dipson was going to put in a theatre in Shelby—T. 1130-32.

4. Shreffler testified that at this conversation Lazar said that he needed the Schine organization to stay in business as Dipson would smother him and that Schine was coming into Shelby and would buy the State theatre and pay $1,000 more than Shreffler could afford and would take the product —T. 1132-34.

5. The Film Daily, the moving picture periodical, said that Dipson was coming in to build a de luxe theatre in Shelby—T. 1135.

6. At this time the Castamba had 476 seats—T. 1136.

7. Shreffler decided to go in with Schine and the contract was signed on September 19, 1937—T. 1137.

8. Shreffler testified that Lazar said that if they found that Schine was coming in the chances were that the State wouldn't be built—T. 1144.

9. Shreffler testified that he began remodelling in June 1937 and spent $30,000 on the theatre and opened up September 28 or 29, 1937, and Schine paid him $15,000 for half of the building cost—T. 1145.

10. Shreffler didn't own the building and had no lease and paid $145 a month rent—T. 1146-47.

11. Shreffler receives $50 a week for managing the theatre and his son does not have to render any services—T. 1162.

[fol. 4848] 12. On July 8, 1938 Schine offered to get out and sell his stock back to Shreffler but Shreffler did not accept the offer—T. 1177, 1190.

13. On Thanksgiving Day, 1937, Richard T. Kemper, one time associated with the Dipson Circuit, opened the State theatre, 454 seats. The Opera House, an upstairs house, 325 seats and not too good was also operating at the time—T. 1193, 1194, 1201.

14. Kemper met Lazar, who said that Shelby was not too profitable and wanted to know what Kemper's investment was and what he would take for it and Kemper said his investment was $15,000—T. 1208.

15. In July 1938 Kemper met Lazar and Lazar said that Schine could not pay the amount, that he had a partner in Shelby and he was not willing to make the deal—T. 1212.

16. Kemper testified that Lazar asked if there was any provision in the lease as to when the theatre must be kept open and Kemper told him the Opera House two days, but nothing in the State, and Lazar said that they would probably close the State and operate the Opera House—T. 1214.

17. In September 1937 Kemper represented Dipson in another matter—T. 1223.

18. Kemper did not make any deal with Schine and in July 1939 turned his theatre over to his associates—T. 1215.

19. Shreffler had another business in town and did not depend on the theatre for his livelihood—T. 1185-1186.

20. Since 1930 Shreffler had received many offers for the purchase or acquisition of an interest in his Castamba theatre—T. 1112.

21. When Shreffler heard that Dipson was going to build a theatre in Shelby he knew that Dipson was a keen competitor of Schine—T. 1176-7.

22. Kemper was successful in obtaining the product of Universal, United Artists, Columbia and Monogram on first run and he was also able to get some first run RKO product for his theatre.—T. 1193, 1124, 1126-7, Ex. D-42.

[fol. 4849] ST. MICHAELS

Pop. 1308

1. In July 1939 Schine became the lessee of the Marada, 524 seats—Int. Ans. 17(A), p. 18.

[fol. 4850] SYRACUSE

Pop. 205,967

1. In January 1927 Schine became lessee, to the extent of a half interest, of the Eckel theatre, 1408 seats, and made additions and improvements at a cost of $78,000—Int. Ans. 17(A), p. 9.

2. In 1935 Loew's was operating the State theatre and RKO subsidiaries were operating the Keith, Paramount and Strand theatres, all first run houses. Senator Walters, representing RKO, asked Schine about Syracuse, and this developed into a joint operation of RKO and Schine, at first 60% to RKO and 40% to Schine and later 70% to RKO and 30% to Schine, under which RKO did the buying and booking. This covered all the first run houses, except Loew's, among the approximately 25 theatres in Syracuse—T. 4110-13, 4197, 2858, 2688.

3. Charles B. Martina obtained a lease of the Empire theatre from March 1, 1940 and sought to buy first run pictures for the Empire and found that they were already licensed to the other first run theatres, of which he had made a survey before he went in. Martina was also aware of the fact that the second run product was already licensed in Syracuse—T. 2603-2626, 2687-2689, 2692-94.

4. The Empire had not had first run or second run—T. 2626, 2693-2694.

5. Martina operated three weeks and six days and played such first runs as were released from the licenses to the first run theatres—T. 2634, 2697.

6. In 1929 the owners of the Strand theatre made a ten-year lease to Warner Bros. Theatre Company, which was transferred later to RKO—T. 2725.

7. In the summer of 1939 Stanley G. Falk, for the owners, negotiated with Mr. Schine and Mr. Myers of RKO for an extension of the lease for two years, ending in August 1941—T. 2734.

[fol. 4851] 8. In the summer of 1941 the owners took up with RKO and Schine the matter of a further renewal. Schine offered a rental of $18,000 plus a percentage of the profits, and Falk was unwilling to lease on these terms—T. 2743.

9. In September 1941 the owners leased to a corporation, of which the owners held half the stock and Hubert P. Wallace the other half, which operated for four or five months—T. 2746, Ex. 812, T. 2793.

10. Wallace, beginning September 9, 1941, sought to get pictures for the Strand and found that he could obtain only those released from the prior runs, or subsequent runs of pictures licensed to other theatres for prior runs. He was advised that first run was sold, as was second run, and that there was a third run choice of an established trade—T. 2859-70, 2801-13, 2816-17.

11. The distributors whose salesmen he approached offered him such pictures as they had available. He refused offers of product made by Metro, Fox and Paramount—T. 4441-59, 2974-3064, 4263-4320, 4516-17, 2807, 2815-19.

12. The prices which the salesmen offered were reasonable prices for such a theatre as the Strand—T. 4348-67, 4441-59, 2974-3064, 4263-4320, 4516-47.

13. Before Wallace became interested in the lease of the Strand in September 1041, Fred Myers had already severed his connection with RKO in May 1941—T. 4472.

14. The pictures offered Wallace for this new venture at the Strand were all open for the runs and dates offered, and subsequently many of them were licensed to others—T. 4283, 4291, 4296; Exs. D-156, 157, 158, 159, 160, 161, 963-978; T. 4273, 4281, 4520-45.

15. The pictures which Wallace selected for the opening of the Strand were RKO's Jungle Cavalcade, released for first run June 27, 1941, and Flying Down to Rio; and he opened with these—T. 4522, Ex. 634, T. 3867, 4447, Ex. D-116.

16. The first call which RKO's salesman Smith made on Wallace in September 1941, was on September 15, at which [fol. 4852] time or the following day, Smith offered Wallace Jungle Cavalcade, Flying Down to Rio, Met in Argentina,

Reluctant Dragon, and Six Gun Gold. Smith informed him that Hurry Charley Hurry and They Meet Again were under contract to the RKO-Schine Syracuse first run theatres and that if passed up by them; these pictures would be available for the Strand; but neither Smith, nor RKO's Branch Manager Lux, assured Wallace of these pictures at any time; and they were shown at the Eckel Theatre in September and October 1941—T. 4719, 4520, 4526, 4535, 4545, Ex. 820, T. 3003, 2996, 2988, 2993, Ex. D-114, D-115, T. 3047, Ex. 980.

17. Wallace did not — in reliance on anything that Smith or Lux had said order the painter, on September 10, 1941 or at any other time, to put Hurry Charley Hurry and They Meet Again on the new front of the Strand, and he did not advertise them.—T. 4519, 4521, 4526, 4535, 3010, 3015, Ex. D-116.

18. Wallace contracted with RKO for several other pictures which he did not play at the Strand and RKO brought suit and recovered judgment for non-performance—Ex. D-117, 118, T. 3024-26.

19. In addition to motion pictures, Wallace played many stage shows, with bands, acts and other things at the Strand and he also offered Bingo games as an added attraction to his patrons—T. 3038-3045, 3055-3056, Id. Ex. D-159.

20. The new operation of the Strand beginning September 20 1941 was an experiment which the owners undertook, because they must pay the fixed charges on the property, even if it was idle, and if the theatre could pay operating expenses and any margin above, it was so much gain over idleness; and an intimation of the plan in operation might induce RKO-Schine to increase their offer of rent above $18,000; but it did not—T. 2743, 2735, 2741.

21. Schine did not have an interest in all of the first run theatres in Syracuse and had no interest in the second, third or subsequent run theatres except the Empire and Palace—Exs. 965-979.

[fol. 4853] TIFFIN

Pop. 16,102

1. Schine became interested to the extent of 50% in the lease of the Ritz, 1322 seats, and the Grand, 750 seats, in March 1936 and the Tiffin, 825 seats in February 1938 and

made improvements to the Ritz at a cost of $6900—Int. Ans. 17(A), p. 15; Ex. D-150.

[fol. 4854] TUPPER LAKE

Pop. 5451

In January 1935 Schine became the lessee of the State theatre, 509 seats, and made improvements thereon at a cost of $8800—Int. Ans. 17(A), p. 15; Ex. D-150.

[fol. 4855] UTICA

Pop. 100,518

1. In January 1927 Schine became the lessee of the Avon, the Gaiety, the De Luxe and the Majestic, and disposed of its entire interest in them from time to time before June 1933—Int. Ans. 17(A), p. 10.

[fol. 4856] VAN WERT

Pop. 9227

1. In February 1935 Schine became lessee of the Van Wert, 1710 seats, newly completed and operated in August, 1935, and in September 1935 of the Strand, and improved the Van Wert at a cost of $3500—Int. Ans. 17(A), p. 15; Ex. D-150, T. 357, 358.

2. In October 1934 Carl B. Moore opened the Ohio theatre and operated it as a first and second run house until the Van Wert opened and then as a second run house—T. 432, 371, 357, 358.

3. In April 1936 Moore offered to sell to Schine and a deal was made and then cancelled at Moore's request, because he wanted to continue to operate the theatre—T. 410, 415.

4. The plaintiff does not offer to show that Moore could not get second run pictures except one season of Metro, and Moore continued to do nicely for second run—T. 429, 456.

5. Moore opened the Ohio at 10¢ and 25¢ in the evening and 10¢ and 15¢ matinee, and in 1935 changed to a straight evening policy of 10¢ and 15¢. This was before Schine opened the Van Wert—T. 441-444.

6. The Ohio theatre had 347 seats and had been closed

for, Moore did not know how many years when Moore opened it—T. 387.

7. It had been a store and converted to a little moving picture show, 40 feet wide and 120 feet deep—T. 388.

[fol. 4857] WATERTOWN

Pop. 33,385

1. Schine became the lessee of the Avon, 1376 seats, and the Olympic, 1649 seats, in January 1927, and of the Palace, 594 seats, in September 1936, and improved the Avon at a cost of $38,500 and the Olympic at a cost of $37,500—Int. Ans. 17(A), p. 11; Ex. D-150.

2. Peter C. Vournakis began to operate the Strand, 400 seats in 1924 and the Liberty, 700 seats, in 1933—T. 3142-43.

3. On August 29, 1934 Vournakis came to Gloversville and received an offer from Schine to buy pictures for his theatres or to buy the theatre for $15,000. Vournakis declined. Schine offered to buy film for $25 a week, and if Schine acquired the Palace he would pay Vournakis a good rent for the Strand, and Vournakis said no—T. 3157-58.

4. On September 3, 1934 Vournakis wrote Schine a letter, to which he received no reply—T. 3157-58.

5. Vournakis testified that, in 1938, he had a conversation with Schine and said we were trying hard to make a living up here and Schine asked if I was interested to sell out, and I said I never thought of it, and Schine said that if I wanted to do anything to tell Bill Tubbert, who was there, and he would bring the proposition over, and about three or four weeks later I decide to go home to Greece and they offered me $35,000 for the Liberty, and I said that I would sell both houses for $85,000 and I haven't heard anything more except the offer for the Liberty—T. 3164-66.

6. A little later we got together, because there were too many houses in town, to close up two houses up there and just open them Saturday and Monday—T. 3169.

[fol. 4858] 7. On September 20, 1939 Vournakis had a conversation with Lynch. Vournakis said:—Schine called me on the telephone and told me that if I went down to Gloversville they had something for me, that would be a benefit up there so we can straighten out the Watertown

situation, and I told him that I wasn't feeling good but I would go down and see him, and I went down and Lynch gave me the paper—T.3171, Ex. 845, T. 3172.

8. About an hour later I talked with Schine and I told him it would be better if we closed up two houses there and he said may be have to do something like that, because they got too many houses—T. 3172.

9. Afterwards he dictated that letter and asked me if I wanted to sign it all right and if I don't want to sign it all right, and I signed it—T. 3173, Ex. 846.

10. The first paper read; Mr. Peter Vournakis of the Strand and Liberty theatres, Watertown, has requested and I have agreed to reduce the clearance of 60 days second run over third run to 30 days on the following companies, Paramount, Fox, Warner, RKO and United Artists—George Lynch—T. 3174, Ex. 845.

11. The later paper was an affidavit stating that Vournakis had been in the theatre business in Watertown for twenty years, "a great portion of that time I had been operating and still operate two theatres in opposition to the Schine theatres in that city, and during the entire period I have never experienced any unpleasantness and at no time have I had any difficulty in obtaining the pictures I wanted to buy. I have always found that their theatres were conducted in a businesslike manner, on a fair competitive basis", and this was sworn to on September 20, 1939—T. 3175, Ex. 846.

12. The offer of $15,000 was for the Strand alone as Vournakis had turned the Liberty back—T. 3176-77.

[fol. 4859] 13. When Schine offered $35,000 Vournakis told him that he wanted $85,000 for both places or nothing and to let him know right away and that was the Strand and the Liberty. They never let him know—T. 3179.

14. The statements in the affidavit are true as far as the thing is there. I always be able to buy pictures after him but not before him. That means I have to wait after they get through and then buy them. As far as the competitive business we always competed there—T. 3179-80.

15. Vournakis couldn't say whether the $15,000 offer was above the mortgage. The mortgage was $10,000—T. 3181.

16. At the time that Vournakis requested second run product of Universal, Metro and Columbia he was not using the product of those companies—T. 3152, 3154-5.

17. When Schine resumed operation of the Avon and Olympic in 1933 the Olympic was charging 25¢ and 35¢, the Avon was charging 35¢ and 40¢, and the Strand and Victoria were charging 25¢. Shortly thereafter the Olympic went to 25¢ all over the house, the Strand and Liberty went to 20¢, and the Avon remained at 35¢ and 40¢. In 1935 the Olympic went to 15¢ in the balcony, the Strand went to 15¢ and 20¢; and the Liberty to 15¢ with 2-for-1 admissions being given out at the Strand and Liberty. After the Palace was taken over by Schine the Olympic went to 25¢ and the Palace charge 15¢ and 20¢. These prices remained in effect until increased due to the tax, and all went up again in 1940—T. 3167-9.

[fol. 4860] WHITEHALL

Pop. 4851

1. The extent of interest in the lease of the Capitol and buying of pictures for it and the expenditures for improvements are set out under Mechanicsville hereinbefore—Int. Ans. 17(A), p. 11.

[fol. 4861] WOOSTER

Pop. 11,543

1. Schine became interested to the extent of 50% in the lease of the Wooster, 1123 seats, in July 1931, the Opera House, 1100 seats, in September 1933, and the Wallace dismantled and made into a store in November 1932, and in the ownership of the Wayne, 679 seats, by the purchase of the land in July 1937 at a cost of $12,000. The cost of erecting the new Wayne theatre, completed in 1938, was $66,000 and the cost of added improvements to the Wooster was $37,500—Int. Ans. 17(A), p. 15; Ex. D-150.

[fol. 4862] Sixth. The defendants request the Court to find the facts following:

1, It does not appear that any distributor or representative thereof promised Schine not to sell to competitors —T. 4167.

2. James R. Grainger, then General Sales Manager of Fox, made no such promise—T. 4167.

3. Schine did not inform Schmertz that Grainger had made such a promise—T. 4162.

4. Schine did not in the course of negotiations for the acquisition of any theatre at any time say to the prospective seller that if he did not sell to Schine he would have difficulty in getting product for his theatre—T. 4168.

5. Schine did not say to any such person that if he did not sell to Schine he would open up another theatre in the town—T. 4168.

6. Schine has not told any one else to make any such statements in negotiating for theatres for Schine—T. 4168.

7. Schine was not at the time of any such negotiations aware that any one had made any such statements—T. 4168.

8. Schine has not said to any one that he approved of their making or having made any such statements—T. 4169.

9. Schine has not asked any distributor to suggest to any person with whom Schine was negotiating for a theatre, or for any interest therein, that unless the theatre or an interest therein was sold to Schine, it would be difficult for the theatre to obtain product —T. 4169.

[fol. 4863] 10. Schine has not in any conversation with any employee of Columbia, Fox, Loew's Paramount, RKO, United Artists, Universal or Vitagraph said that any one of them should not deal with a competing exhibitor to Schine—T. 4169.

11. Schine has not written any such statement to any of them—T. 4170.

12. Schine has not said to any one of them that if they made such a sale Schine would not buy from them elsewhere in the Schine Circuit—T. 4170.

13. Schine has not for the acquisitions of theatres made any threats or misrepresentations—T. 4150.

14. It does not appear that in negotiating for product for the Schine Circuit there has been any departure from the normal and usual courses pursued in the industry for such negotiations to get the best prices and terms and runs and

clearances obtainable for the Circuit by earnest and fair negotiation. Plaintiff's Admissions T. 4615-4618, T. 4334-4356, 4478, 4375, 4476, 4376-4378, 4556, 4605, 4415, 4386, 4508, 4604, 4397-4398, 4401-4421, 4487, 4554, 2468, Exs. 741-744, T. 1166, 4557-4559, 4488-4489, 4614, 2864, 3665-3668, 2408, 2447, 2452, 2492, 2536, 4508, 4609, 3946, Ex. 190, D. 2-9, T. 200, 235, 3637, 3677.

15. Schine has not monopolized or restrained the flow of moving pictures from any other state into any town in any state, either in quality or in money value.

16. It does not appear that the financial growth of Schine has been out of line with the physical enlargement and betterment in the number and character of the Schine theatres.

17. This enlargement has been predominantly by Schine, and not by combination with others.

18. It has been by normal business practices, and not predatory.

[fol. 4864] Seventh. The defendants request the Court to find the facts as to the policy of the several distributors to be as follows:

1. For the past 15 to 20 years the normal method of licensing the exhibition of copyrighted motion picture photoplays in the United States of America, including the states of New York, Ohio, Kentucky, Maryland, Delaware and Virginia, has been on a so-called run basis, to wit: For a first run to a theatre in a local competitive area with such exclusive exhibition rights and clearance privileges, if any, as may be appropriate to the successful exploitation of said copyrights in said area; for such subsequent runs in said area, and with such exclusive rights and privileges, if any, as may be appropriate to the successful exploitation of said copyrights in said area—Plaintiff's Admissions 4615.

2. It has been the usual and customary practice for the distributor to agree with its licensees that it will not exhibit or grant a license to exhibit its photoplays for exhibition in conflict with the run licensed the exhibitor, or prior to the clearance period agreed upon with the exhibitor—Pltf's. Adm. 4616.

3. The motion picture industry has developed under the existence of clearance and runs. It is by such a system with

initially large receipts from prior run exhibitions and successive reduction of license charges that satisfactory revenue can be derived by the producers and distributors so that costly feature pictures can be made available to the whole public at varying admission prices—Pltf's. Adm. 4616.

4. In each competitive area under normal business conditions of free competition each distributor desires to license its films for successive runs in such area under such clearance terms as will yield the maximum total license revenue from the area. In determining which theatre shall have which runs its past business relations with the theatre, [fol. 4865] the skill and character of its management, its size, location, equipment and drawing power are all features which among others may influence such decision—Pltf's. Adm. 4617.

5. Motion pictures are works of art and are the subject of copyright. They have no uniform or market value and the revenue which an owner of a copyright can derive from any picture or group of pictures depends upon the ability of the distributor to market them in different situations to the best advantage—Pltf's. Adm. No. 23, 4618.

6. Of the Schine theatres approximately 80% are located in cities or villages with populations under 25,000 and 60% are located in cities or villages with populations under 10,000—Pltf's. Adm. No. 11, 4617.

7. In a competitive area, where there are opposing possible theatres, to which films may be licensed, the distributor generally licenses the picture and determines the rental in accordance with the box office grossing ability of the picture at the theatre to which the distributor decides to license the picture—T. 4334.

8. The cost of the original production of a picture to the point where the negative is ready, so that positives for showing can be made, at times runs into millions of dollars. Each positive taken from the negative costs approximately $185 or more in addition, and if it is in technicolor the cost of the positive runs much higher—T. 4335, 4337.

9. For the average picture Fox makes about 300 positive prints of an "A" picture and on an especially good picture as high as 360-370 such prints—T. 4337.

10. There are in operation in the United States, equipped for sound, in excess of 17,000 theatres—T. 4336.

11. A very good picture distributed by Fox would play approximately 14,000 of those theatres—T. 4341.

[fol. 4866] 12. A single print would be called upon to serve from 40 to 50 theatres—T. 4341.

13. An ordinary tour of a print from the time it leaves the exchange to go to one theatre, through transportation time, time of exhibition at the theatre, transportation time on return of the print, and inspection requires several days before the print can start out for its next theatre—T. 4341.

14. Fox serves that print over about a year of time to cover all the theatres in which that particular print is exhibited—T. 4342.

15. Fox has 31 exchange centers, each serving an area in which from 450 to 500 theatres on an average are located —T. 4343.

16. The prints are served in a sequence of time, starting generally to play first the larger theatres in the larger cities and towns, because those are the theatres that do the biggest business and the distributor regards them as a show window for the entire exchange territory, and in that show window the picture is well advertised, in the newspapers and sometimes in radio programs and in lobby displays and in front of the theatre—T. 4343.

17. The effort of the distributor and of the exhibitor is to have the selection of the theatres to show at a particular time, so made that they will be spaced in areas so that the pictures are shown in the different theatres in such a way that a particular picture showing in one theatre will not draw directly away from another theatre playing the same picture that day—T. 4344.

18. In determining the runs and the period and area of clearance the distributor figures that there is a certain amount of money that an individual of the public has to spend for motion picture entertainment during a given week, and that there is competition for that sum because what [fol. 4867] is spent to see it in the first run house will leave so much less to be spent in the second run house, so that the first run house and the second run house playing later

are in competition with each other or with any other theatre, and the distributor desires to have as much go into the first run house because the distributor can get more money out of that theatre than out of subsequent run theatres—T. 4344.

19. It is estimated that of the total revenue of a distributor 70% comes from the first run theatres and 30% from all other theatres playing second and subsequent runs, and that the 70% or 75% is made up of 35% or 40% from towns under 50,000 population and the other 40% or 35% from those over 50,000 population—T. 4345, 4608.

20. The plan of clearance came into the industry as a means of protecting the prior run theatre whose capital cost is very large, running in a medium sized town in the early days from $75,000 to $100,000 up to an investment of a million dollars or more in later days, which needed the protection for the investment by playing the first run of the picture a sufficient length of time before a second run in the same competitive area, so that the expectation that the picture might be seen in the same competitive area too soon would not detract from the attendance at the first run theatre and the consequent box office receipts there—T. 4479, 4346.

21. In determining the film rental, whether a percentage rental or a flat rental, the distributors aim at 35% of the gross box office receipts as the index in pricing—T. 4347-50, 4482, 4483, 4317, 4319.

22. It is the custom of the industry, if the box office receipts fall below the expectation on which the flat rental was based, to make subsequently a reduction in that rental to the point where the exhibitor can at least break even or show a small profit—T. 4347.

[fol. 4868] 23. In determining the rental in the first place the distributor endeavors to estimate how much money the theatre could gross on the particular picture—T. 4348.

24. In the normally successful downtown city theatre, with a seating capacity of 1600, conducting a matinee and two successive evening performances, it is estimated that in the course of the three performances there will be in the aggregate 1600 admissions, so that if the average admission price was 25 cents, the gross to be expected would be $400 a day, or for a 4-day showing $1600—T. 4350.

25. At 35% of this estimate the asking price would be something like $550 for a flat rental for the picture—T. 4350.

26. It is customary to allow a deduction for the cost of a second feature if the theatre is showing double features, and for the cost of outside attractions at the theatre while showing the picture before applying the 35%—T. 4352.

27. The effort of the distributor is to get the percentage of gross receipts at a second or subsequent run theatre in the same way as at a first run theatre—T. 4374.

28. Where there is only one theatre in a particular competitive area, the principal competition to supply pictures to that theatre is among the ten larger companies—Columbia, Fox, Metro, Monogram, Paramount, Republic, RKO, United Artists, Universal and Warners—and of these, Fox, Metro, Paramount, RKO and Warner are sometimes spoken of as the Big Five, producing the larger number of pictures which are box office attractions in the cities, but the Western and action pictures, in which Republic and Monogram have specialized, are most popular in the little towns of the South and West and more preferred on that account by exhibitors —T. 4478, 4375.

29. Where there is more than one theatre that is a possibility for the distributor to sell, the distributor in selecting the customer to be obtained, if possible, takes into consid- [fol. 4869] eration the ability of the customer to gross, the operation of the theatre, the people conducting the business, the more substantial business man of the two, the theatre itself, in view of the distributor's desire to play its pictures in the nicest theatre with comfortable seats, a theatre showing a good clear picture on the screen, one that is well ventilated and well managed all the way through, with a desire to play the picture in the theatre charging the higher admission price, and there are other elements to be considered—T. 4476, 4376, 4556, 4605.

30. In selecting a second run in a competitive area the distributor takes into consideration first a protection of the film rental that is expected to come out of the first run and then the distributor makes sure that the operation of the theatre and the playing of the picture there will not harm the possibility of that picture doing its full amount of business, the full amount of business it is capable of

doing at the first run house, and the distributor also takes into consideration the condition of the house itself, the projection, sound, ventilation and location of the theatre, with an inclination toward a busy corner or a location where more people are closer to the theatre, rather than one that is around the corner and off the beaten path—T. 4377.

31. At times a picture after playing a first run in a theatre will be moved over to another theatre operated in common interest with the first, and this is ordinarily done without any interval of time between the end of the showing in the one theatre and its opening up in the other, and this is called a move-over run, which is treated as a part of the first run, as an entire run, and not as a second run—T. 4378, 4415.

32. The foregoing policies are in general the policies of each of the distributors—T. 4386, 4507-8, 4476, 4556, 4604.

33. The United Artists is not a producing company, but distributes the pictures produced by several independent producers—T. 4387.

[fol. 4870] 34. Distributors consider that clearance is one of the most important things that they have to sell—T. 4397-98.

35. Prior to 1941 each distributor tried to sell at one time all the pictures that this distributor had for the coming season—T. 4400.

36. If a customer is a solid customer, who pays his bills and gives an honest count, and the distributor has been dealing with him over a long period of time, they don't get a guarantee from him on the percentage pictures—T. 4401.

37. The distributors considered the Schine Circuit terms to be very satisfactory terms and the deals made with that Circuit were comparable with the deals made with anybody else—T. 4403, 4404.

38. In selling a group of pictures to the Schine Circuit there might be some pictures sold at 35%, some sold for lesser terms, and some on flat rental, dependent on the quality of the picture in general and the distributor's ability to get the price—T. 4403.

39. The effort of the distributor is to get a price which

is fair both to the distributor and to the exhibitor, and to take into consideration the effect on subsequent sales to him —T. 4405.

40. In fixing a price to one theatre consideration is not given to the price charged to another theatre, but to the expectation of the gross box office receipts of the particular theatre—T. 4413-14.

41. Size of theatre alone does not determine, as amount of playing time and ability to fill the house must also be considered—T. 4421.

42. It is to the advantage of the distributor to have the first run theatre also play the second run—T. 4487, 4554.

[fol. 4871] 43. In issuing licenses for more than one season's product, which the plaintiff has described as a franchise, no distinction is made between large circuits and independent exhibitors operating only a few theatres, and more franchises have been issued to the latter than to the former—T. 2468, Exs. 741-744, T. 1166, 4557, 4488, 4614, Id. Ex. D-39, Exs. D-47, D-48, D-123-129, T. 1170; Id. Ex. D-39.

44. Such a franchise to independent small exhibitors and to circuits is advantageous at times both to the distributor and to the exhibitor as it gives the distributor an assured outlet in the town, saves the expense of going back and selling the town each year, and it gives the exhibitor an assured supply—T. 4489, 4559, 3946, Ex. 190.

45. It does not appear that these licenses for more than a year have been made for the purpose of restraining or monopolizing interstate trade—same references as 43 and 44.

46. They have been made to give the distributor an outlet for the period of the licenses and the exhibitor product for his theatres for the same period—same references as 43 and 44.

47. Independent exhibitors and affiliated exhibitors regarded clearance as of much importance and sought and believed that it improved the receipts of the theatre having it—T. 2864, 3665-68, 2408, 2447, 2452, 2492, 2536.

48. Distributors in the general course of their sales policy

send out salesmen to solicit theatres which the distributor desires to sell and to bring in applications for contracts, if they can be obtained, to the branch managers, who consider them. If they disapprove, they send the salesman back to see whether a better contract can be obtained, or if the branch manager thinks the contract an advisable one, he forwards it with his recommendations either to the home office of the distributor or to the district manager, who in turn if he favors the contract forwards it to the home office. No contract is made until the general manager at the [fol. 4872] home office has approved the contract, and no one except such manager has authority to approve a contract—T. 4492, 4513, 4555, 4563, 1508, 1428, 1435, 1392, 1401, 1407, 1522, 1528.

49. In the case of circuits the preliminary negotiations were usually carried on directly from the New York office by the New York sales representatives and not through the branch offices—T. 4397.

50. It is estimated that about 1% of Paramount's film rental revenue came from the Schine Circuit—T. 4609.

51. It does not appear that in negotiating with the Schine Circuit any distributor has pursued any abnormal policy—Plaintiff's Admissions T. 4615-4618, T. 4334-4356, 4478, 4375, 4476, 4376-4378, 4556, 4605, 4415, 4386, 4508, 4604, 4397-4398, 4401-4421, 4487, 4554, 2468, Exs. 741-744, T. 1166, 4557-4559, 4488-4489, 4614, 2864, 3665-3668, 2408, 2447, 2452, 2492, 2536, 4508, 4609, 3946, Exs. 190, D-143, D-144, D-170.

52. To the knowledge of the general sales managers of the respective distributors, Fox, Loew's Paramount, RKO, United Artists, Universal and Warners, there has not been any conversation with any of the defendants or their executives or employees not to deal with any competing exhibitors or to restrict the terms of such dealings—T. 4381, 4385, 4490, 4510, 4560, 4564, 4585, 4613.

The defendants request the Court to find each and all of the facts hereinbefore set forth.

By their Attorneys, Edward F. McClennen, Willard S. McKay, Howard M. Antevil.

[fol. 4873] In the District Court of the United States

[Title Omitted]

Certificate of Clerk

I, May C. Sickmon, Clerk of the United States District Court for the Western District of New York, do Hereby Certify that Plaintiff's proposed Findings of the Court and Judgment, referred to as part of Item 7 of Defendant's Supplemental praecipe dated June 26, 1946 are the same Findings and Judgment as those forwarded as Items 9 and 10 of the Defendant's praecipe dated April 16, 1946.

In Witness Whereof I have hereunto set my hand and the seal of this Court this 2nd day of July, 1946.

May C. Sickmon.

Subscribed and sworn to before me this 2nd day of July, 1946. Margaret E. Baysor, Notary Public—Niagara County. Certificate filed in Erie Co., N.Y.

[fol. 4874] In the United States District Court—Western District of New York

Civil No. 223

United States of America, Plaintiff,

v.

Schine Chain Theatres, Inc., et al., Defendants

Appearances:

Wendell Berge, Assistant Attorney General; Robert L. Wright, John P. Claggett, Harold L. Schilz, Albert Boggess, Special Assistants to The Attorney General; Philip Marcus, Milton Kalas, Special Attorneys; George L. Grobe, United States Attorney; for the United States.

Edmund McCarthy, Attorney of record; Willard S. McKay, Edward F. McClennen, Saul F. Rogers, Arthur J. Homans, Arthur H. Whitemore, Howard M. Antevil, of Counsel for Defendants.

OPINION—Oct. 8, 1945

KNIGHT, District Judge:

This suit is brought by the United States to restrain violations of Sections 1 and 2 of the Sherman Act (28 Stat. 209, 15 U. S. C. Secs. 1 and 2). Schine Chain Theatres, Inc., a [fol. 4875] New York holding and service corporation, five other corporations in which Schine Chain Theatres, Inc. owns all the stock to wit, Schine Theatrical Co., Inc., an operating company, Schine-Lexington Corporation, a holding company, Schine Enterprise Corporation, a service corporation, Schine Circuit, Inc., a service corporation, and Chesapeake Theatre Corporation, a holding corporation, and also three individuals, J. Meyer Schine, Louis Schine and John A. May, are the defendants. Hereinafter the corporate defendants will be referred to as "Schine", the "Schine Circuit" or as "the Circuit".

This organization has seen an exceedingly rapid growth. Its origin was the purchase by defendants J. Meyer Schine and Louis Schine of three theatres in Gloversville, New York, in 1920. In the twenty-one years following, these defendant corporations acquired, either as purchaser or as lessee, an interest in 175 theatres and in addition some 42 separate parcels of real estate for theatre purpose, or connected with such purpose. The development came about in this manner. Schine Chain Theatre, Inc., the parent corporation, was organized in 1920. The above-named subsidiary corporations came into being in the several years 1926, 1935, 1937 and 1938.

Steps following in line with the purpose of the "Schine Circuit" were the organization of realty holding corporations and what may be termed local corporations, or the taking over of others of such for the operations of theatres. Since 1931, there have been 118 theatre corporations in which an interest has been acquired by "Schine". As of the time of the commencement of this suit there were 62 of such operating corporations and in 48 of these "Schine" owned 100 percent of the stock, in 12, 50 percent. Schine [fol. 4876] operates 93 theatres in 73 towns (including cities). The towns run generally in population from 5000 to 35000 and include 39 in New York, 16 in Ohio, 8 in Kentucky, 7 in Maryland, 2 in Delaware and 1 in Virginia. In addition to its theatrical and realty operations, "Schine" has booked and bought for and supervised 37 theatres since

1931, and when this suit was brought there were 27 for which it so acted. Since 1928 the closed towns (those in which there was no opposition) show a total increase of 56. In 1941 there were only 3 towns in which Schine's competitors (hereinafter called independents) were playing major film product. In a single season, 1939-1940, Schine paid $1,647,000 to six film companies. The "Schine Circuit" buying power beyond peradventure was extremely large, and its opportunity to utilize this power in the purchase of films to the detriment of its competitors is apparent. These defendants together control the largest independent theatre circuit in the country. For theatre acquisitions and capital improvements there has been expended admittedly upwards of $10,948,100, not including dividend payments on operating expenses and cash on hand.

Some of the computations as hereinbefore shown are not the same as those claimed either by the government or by the defendants. These computations are made from defendants' extensive answers to interrogatories. The differences are not of material moment. There are eight so-called major film companies: Fox, Loew, Paramount, Radio-Keith-Orphum (RKO), Warner, Columbia, Universal and United Artists. Columbia and Universal produce and distribute films; United Artists only distributes; and the other companies both produce and distribute films and operate theatres. These eight companies supply "Schine" [fol. 4877] a large percent. of the feature films used by him and together receive upwards of 75 percent. of the total film rental paid by Schine. All of them originally were made parties to this suit, but all have since been dropped as such. However, each is claimed to have participated separately with Schine in the conspiracy charged and in aid of Schine's monopolization of the film exhibiting business. The principal sales office of each major distributor company is in New York City and that city serves theatres here involved. The methods of licensing and servicing of films *is* similar with each. Each has its district manager and branch manager. The feature films are mostly produced in California where the negatives are taken, the prints being generally manufactured in New York and New Jersey. Film license applications are solicited by salesmen from the branch office, and the delivery and return of films are made through the branch. Prints of films are sent from the various exchange offices in the various states to the exhibitors of the

main office, though the recommendation for approval ordinarily is made by the branch manager who is close to the situation. It was the usual custom for the distributors to make license agreements for feature films for a period of a year commencing about September. These license agreements were made before the films were produced. Ordinarily each major producing company put out 40 to 60 feature films a year and these were released at the rate of about one a week. Now the practice generally is to sell group pictures only after production and in groups rather than for a year.

The individual defendants hold the principal offices in the defendant corporations and hold other offices in the various so-called local corporations. They are the princi- [fol. 4878] pal stockholders in the parent corporation and have general supervision of the operations of the circuit. The film buying for the circuit and the companies in which it had an interest was conducted through "Schine" or one of its subsidiaries. Lazar, a regional manager for "Schine" covering several states, and Silverman and Hensler, district managers, and one Insley, principally carried on negotiations for acquisitions, though the defendants Schine and May engaged directly in some, while one Lynch was "the Circuit's" chief film buyer. In circuit buying "Schine" generally negotiated deals with the division manager. The agreements so made are referred to as "master agreements and deal sheets", but these were usually followed by license agreements signed by the chief sales executive of the distributors.

To substantiate its claims that these defendants have violated the aforesaid provisions of the Sherman Act, the government contends that they have used their great buying power to suppress competition by bringing about various restrictions on the competitors' ability to compete, resulting in persuading the competitor either to sell to "Schine", operated on an inferior basis or join in pooling his interests with "Schine"; that this suppression has been brought about in various ways, to wit: by depriving independents of first and second run products, either entirely or to such a time as materially lessened income and force sales or abandonment, by implied threats voicing "Shine's" great buying power, by threats to construct theatre buildings to discourage other construction, by cutting admission prices, by inducing theatre sales through agreements to

employ sellers, by fixing by agreement the duration of time and the distance within which an independent selling should [fol. 4879] not be permitted to compete and by unreasonable clearances obtained from the distributor. These generally are the claims. The defendants' denial make the issues.

Section 1 of the Sherman Act provides that "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade of commerce among the several states * * * is hereby declared to be illegal * * *", and

Section 2 of that Act provides that "Every person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, * * * shall be guilty of a misdemeanor."

Said the court in Northern Securities Co. v. United States, 193 U. S. 197 (404): "All that is added to the first section by section 2 is that like penalties are imposed upon every single person who, without combination, monopolizes or attempts to monopolize commerce among the States; and that the liability is extended to attempting to monopolize any part of such trade or commerce." "* * * the two sections overlap in the sense that a monopoly under section 2 is a species of restraint of trade under section 1." United States v. Socony-Vacuum Oil Co., 310 U. S. 150 (226).

Any question as regards the applicability of the Sherman Act in certain respects here shown has been clearly answered by the decision of the Supreme Court in United States v. Crescent Amusement Co., 323 U. S. 173. Under definitely comparable facts that Court held: 1. That this court has jurisdiction. 2. That it is immaterial whether the distributors or any one of them were members of a conspiracy or joined in the effort to monopolize. 3. That [fol. 4880] while the business or the showing of motion pictures is local, a combination of exhibitors may violate the Sherman Act by using their collective buying power to restrict or restrain competitors. 4. That the relationship between the circuit members is such that they may be capable of conspiring or combining with each other in violation of the Act. 5. That the circuit, in essence, is not a single exhibitor. "All three phases of the motion picture business * * * constitutes a part of interstate commerce." William

Goldman Theatres, Inc. v. Loew's, opinion filed August, 1945, (3d. C.).

In the Crescent case twelve theatre operating companies, and certain individual stockholders, as well as distributor companies, were charged with the violation of the Sherman Act in combining with each other and with major distributors to effect monopolies. This language from the opinion supports the statement as to the aforesaid conclusions: "And as we have said, the course of business which involves the regular exchange of film in interstate commerce is adequate to bring the exhibitors within the reach of the Sherman Act" and "The District Court found that some of the exhibitors were co-conspirators on certain phases of the program. But we can put that circumstance to one side * * *. For it is immaterial whether the distributors technically were or were not members of the conspiracy." and "But action by a combination of exhibitors to obtain an agreement with a distributor whereby commerce with a competing exhibitor is suppressed or restrained is a conspiracy in restraint of trade and a conspiracy to monopolize a part of the trade or commerce among the States." Sustaining the action, the court necessarily held the Circuit is not in essence a single exhibitor; and that there can be [fol. 4881] concerted action between a corporation and its wholly owned subsidiaries, and the fact that defendants owned one-half or less percent. of the stock of corporations who are not parties herein does not preclude consideration of acts done by these corporate officers or by defendant's acts in connection with such corporation. Vide also: Chicago Board of Trade v. United States, 246 U. S. 231; Paramount Famous Lasky Corp. v. United States, 282 U. S. 30; Interstate Circuit v. United States, 306 U. S. 208; United States 1. General Motors Corp., 121 F. (2d) 376, cert. denied 314 U. S. 618, 708.

The defendants assert that buying the only theatre in a town and building additional theatres, or buying additional theatres, or advising of intention to open another theatre, or making known the product buying ability of the chain, or buying product on better terms than a competitor, or becoming large by normal growth, causing inability of inferiorly operated theatres to get good product, or agreeing with the seller of a theatre not to compete within defined limits for any period of time, cutting or

raising admission prices, obtaining clearances, or using so many pictures that demand for product of minor distributors is increased, does not monopolize or restrain trade or commerce among any of the several states. "We may assume that if a single exhibitor launched such a plan of economic warfare he would not run afoul of the Sherman Act." Crescent case, supra. Obviously, doing any one of the aforementioned things, disassociated from any other act, would not be violative of the Sherman Act; but surely a circuit may so utilize one or more of such efforts as to illegally stifle competition or monopolize the theatre business in different locations. Motive is essential.

[fol. 4882] The defendants say that the Sherman Act prohibits only unreasonable restraint of trade and that it must affect trade or commerce between states. Apex Hosiery Co. v. Leader, 310 U. S. 469. There can be no question that this is a correct statement of law. The Act does not condemn monopolies as such, but prohibits monopolization or attempts to monopolize trade or commerce between the states. The verb monopolize comprehends conduct or actions. Standard Oil Co. v. United States, 221 U. S. 1. Through monopolization a monopoly may be secured. We are concerned here with what are claimed to be unreasonable restraints of trade. The word unreasonable as so used is broad enough to include a conspiracy in restraint of trade and monopolization of a business in restraint of trade. Unreasonable, as used in the statute, refers to a degree of restraint. Defendants further assert that the Act does not condemn restraints of trade which do not have a direct and immediate effect upon interstate commerce. The contrary of this assertion, as applicable here, is decided by the Crescent case, supra. Defendants also say that an agreement for purchase of product coupled with clearances over succeeding runs is valid, citing Standard Oil Co. v. United States, supra. Of course, the mere agreement for the purchase of first runs and reasonable clearances is within the law; but the charge of a conspiracy contemplates a "combination of two or more persons by some concerted action to accomplish * * * an unlawful purpose" and monopolization contemplates acts to monopolize or control trade or commerce between the states to the exclusion and disadvantage of others.

The record herein includes 4728 pages of testimony and 1380 exhibits. We are here concerned with 32 different

[fol. 4883] situations, each involving the testimony of various witnesses and numerous exhibits. It is not only practically impossible to set out in this opinion every phase of the testimony which has been presented, but it is unnecessary.

Many objections were raised by the defendants to the reception of evidence of inter-department communications and statements of and communications from representatives of the distributors. These objections were based, both on the ground that such were incompetent in the absence then of proof of a conspiracy, and also that there was no proof of the authority of such representatives to make the declarations or give the communications.

It is not necessary that proof of the conspiracy be made before overt acts are proved. The order of the proof lies within the discretion of the court. "There is no hard and fast rule that the evidence of concert should be first put in. • • • The order of production of evidence is one largely in the discretion of the court." Doyle v. United States, 169 F. 625. Among other cases supporting this view are: Eastern States Retail Lumber Ass'n v. United States, 234 U. S. 600; Cohen v. United States, 157 F. 651, cert. denied 207 U. S. 596; Paramount Pictures Inc. v. United Motion Picture T. O. 93 F. (2d) 714, Glaser v. United States, 315 U. S. 60, cited by defendants, does not support their view.

Statements and acts of agents or representatives within the scope of their authority indubitably are admissible to show a conspiracy. Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229; Erie RR. Co. v. Winter, 143 U. S. 60; Johnson v. J. H. Yost Lumber Co., 117 F. (2d) 53. Further, in conspiracy cases a great deal of latitude is permitted the court in the reception of evidence. "The rule [fol. 4884] will be sustained if the testimony which is admitted tends even remotely to establish the ultimate fact." Clune v. United States, 159 U. S. 590. See also: Williamson v. United States, 207 U. S. 425; Wiberg 1. United States, 163 U. S. 32; Isenhouer v. United States, 256 F. 842; White v. United States, 80 F. (2d) 515.

There is a conflict in the testimony in many of the situations. The court recognizes the burden is cast upon the plaintiff to establish its cause and/or causes of action by a fair preponderance of the proof. It is quite patent from the nature of the charges here that they have to be estab-

lished by numerous acts and transactions having relation some way to the charge. These acts must be considered together to show intent, and intent to "combine", "conspire" and/or "monopolize" must be the reasonable and natural conclusions from the acts or transactions, as believed by the court. Ordinarily proof of such acts comes from circumstantial evidence and the inferences which are ordinarily drawn from these. As was said in William Goldman Theatres, Inc. v. Loew's, supra: "The picture of conspiracy as a meeting of a trio of sinister persons in pointed hats close together belongs to the dark ages"., and further: "The requirement is to fit the inferential facts into the framework of the primary parts * * *." "It is elementary, however, that conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done, * * *." Eastern States Retail Lumber Ass'n v. United States, supra.

It is the opinion of this court that the defendants have violated Section 1 and Section 2, supra, of the Sherman Act, in that they have maintained an unlawful combination among themselves by means of which they have unreason-[fol. 4885] ably restrained trade or commerce among the several states and have monopolized the business of operating theatres and the supplying of major films in various towns and cities, and that each of the major distributors hereinbefore named, by the methods which it has employed in its dealings with Schine and the independents, has aided and abetted these defendants in unreasonably restraining trade or commerce between the states and the "monopolization" of theatre operations.

The great film buying power of the defendant corporations gave opportunity to exert pressure on the distributors to obtain preferences. The extent of this film buying is demonstrated by the exceedingly large number of theatres controlled by "Schine" and the large amount of money which must have been paid for film rentals. The aggregate of the amount paid all distributors in total or for one season is not shown, but what the "Circuit" paid six of the major distributors, for features for a single season, does appear. This buying power included both closed and open towns. By combining the open and closed towns in Schine's deals with the distributors, Schine was enabled to dictate terms to the distributors. This ability to dictate terms was further increased by the authority of Schine to buy product

for theatres not owned or operated by it. Schine acquired by purchase or lease 55 theatres from 1922 to 1931, and 80 from 1936 to 1941, inclusive, 15 in 1938 and 15 in 1939.

The means and methods employed by the different defendant corporations through their officers and authorized representatives to obtain a "monopolistic" control were numerous. Principally among these were arbitrarily depriving independents of first and second run pictures, se- [fol. 4886] curing unreasonable clearances, making threats to build or open closed theatres to prevent construction or operation by independents, lowering admission prices, obtaining rental concessions, restricting independents who sold to Schine as to periods and places of operation, making long time franchise agreements covering the "Circuit."

Standing out as clearly indicative of intent to "monopolize" are communications and statements made by May, Lunch, Lazar, Hensler and Insley, undisputedly authorized representatives of the defendant corporations. There are others from defendant J. Meyer Schine as well.

Some specific instances showing the predatory means used by "Schine" follow.

The Schine defendants arbitrarily deprived independents of the first run product which they had previously enjoyed in several towns. Independents were deprived of 1936-37 Columbia product at Norwalk; 1935-36 Fox product at Van Wert and Bucyrus; Loew's product for 1930-31 at Bellefontaine and for 1935-36 at Van Wert; Paramount's 1935-36 product at Van Wert and Bucyrus; RKO product for 1933-34 at Auburn and 1935-36 at Norwalk; of United Artists 1936-37 at Norwalk; and of Warner for 1933-34 at Norwich, 1936-37 at Norwalk, and 1941-42 at Harlan.

Independents were arbitrarily deprived of second run product which they had previously exhibited, losing 1938-39 Columbia at Rochester, Loew's 1935-36 at Van Wert and 1934-35 Warner at Watertown. After "Schine" secured the product from the independents for the aforementioned seasons, he retained it and the independent was unable to secure it in subsequent seasons. Relative to six towns including Corning, Lynch wrote on October 21, 1933, Metro: "If there are any other opposition towns where you be- [fol. 4887] lieve you can sell a second run, I would appreciate it if you would take the matter up with me first before selling." In 1932 Lynch wrote Flynn a letter saying, among other things: "I want you to refrain from selling

him (independent) any pictures whatsoever." and Metro through Flynn agreed not to do so. Lynch also wired Fox to withhold selling to this independent and wrote Fox' agent saying "have also asked him (Schmertz—Fox agent) to refrain from selling this man second run."

"Schine" was able to secure unreasonable clearances year after year in many towns. A few only need be mentioned. At Corning, New York, RKO permitted 90 to 180 days, and Fox permitted 160 days. At Seneca Falls, New York, Columbia and United Artists permitted 120 days. At Little Falls, New York, RKO, Columbia and Universal permitted 120 days and United Artists permitted 115 days. At Carthage, RKO permitted 120 days and United Artists 90. United Artists permitted 90 days at Watertown, New York, and 90 days at Amsterdam, New York; Bucyrus, Kent, Norwalk, Tiffin and Fostoria, Ohio; and Lexington and Van Wert, Kentucky.

The license contracts with "Schine" in many instances specified minimum admission prices for the various runs as well as clearance period. To an extent this affects adversely the time given the competitor. Interstate Circuit v. United States, supra, clearly points the reasons for condemning such provisions in a film license contract or agreement. Schine got clearance of Herkimer over Ilion where none existed before.

"Schine" made threats to build in various towns, such as Paris, where there was a sign up, Canandaigua by a sign and newspaper article published, and where he eventually did build. In Perry, a statement by May and a newspaper [fol. 4888] article announcing that land had been bought for theatre purposes came at a time when "Schine" was trying to purchase the independent's lease. "Schine" did not build, but later got the lease. In Salamanca, just after independents acquired a site for a contemplated theatre, through the press "Schine" announced its intention to build. In Medina, "Schine" announced the making of an agreement to erect a new theatre immediately after independents started construction. In Mount Vernon, May contacted the independent to buy, saying "Schine" would build unless the deal could be put through.

Defendants' authorized agents made statements to independents which are reasonably construed as threats.

At Bellefontaine, during negotiations for the renewal of

a lease with an independent, Lazar threatened to re-open the Opera House, if the independent opened the Strand.

With reference to Paris, Lazar told the independent, who was taking steps to build, that if the independent went ahead with his projects "Schine" would build a 1200 seat theatre in Lexington where the independent had a theatre and that the house would be run with 10¢ policy at all times. At Paris, Schine and an independent began construction at practically the same time. Lazar asked the independent to stop construction and see him about a deal. Subsequently Schine took over the independent's Lexington and Paris theatres under an agreement prohibiting for fifteen years the independent from engaging in the theatre business in any town in Kentucky where Schine had a theatre.

Just before Schine acquired the "Forum" theatre in Norwalk, Lazar advised an independent to "get in with us • • • we are a big company. You know what it means if you are not in with us," and further stated: "If you lease [fol. 4889] your theatre Mr. William Selman (part owner of the "Forum") will walk out of town."

At Van Wert, the operator of the "Ohio" theatre could not get first run product it had had. During negotiations for the sale of the "Ohio" to Schine, Lazar said that Moore would have trouble getting product; Schine would have the first runs; and that Schine was interested in buying in order to raise prices.

At Lockport, during negotiations with "Schine" for the "Palace" theatre, May said it would be necessary to re-open the Hi-Art owned by "Schine" to use up "the large volume of product they had bought." This statement evidently was made to induce Reliance to sell the "Palace." In this instance it is to be noted that the independents experienced great difficulty in getting product. Hi-Art had then been closed for seven years. Metro, Fox, Universal and Loew's refused major product to the independent. Indicative of the attitude of the distributors is the letter from the Eastern Salesmanager of Loew's who wrote:

> "In our negotiations with the Schine interests it will very likely be that we will have to give them consideration for our product at Lockport, as well as other situations, and as we are hardly in a position to forego or jeopardize the business from their other situations, and for the further reason that they have for a number of

years been a very representative account, we feel that our interests would be best served by giving them such consideration."

At Perry, May told the independent that "Schine" had bought a lot to build a 1000 seat theatre there. This was a town of less than 5000 population. The independent theatre building was owned by the town and leased to the independ-
[fol. 4890] ent. When May said this, a local newspaper article to the same effect was given out. Schine did not build but Herzberger sold shortly thereafter, and through the purchaser of this interest Schine acquired the lease.

Insley and May tried to buy an independent theatre at Seaford and Georgetown. Insley said it was foolish that the independent did not make a deal with "Schine" because he had recently purchased the theatre at Laurel and "Very likely, with the buying power they had they would get away the product" from the independent. Insley said Schine had bought a lot with the intention to build a theatre in Seaford, and also said: "Well, if I were you I would sell the theatres to Schine because they are going to build a theatre there, and, naturally, they are going to get the product." Insley, under a written contract with "Schine", had authority "in negotiations for the acquisition of motion picture theatres within the above-described territory" (Delaware, Maryland, Virginia). Seaford and Georgetown are in Delaware.

At Rochester, J. Meyer Schine told independents, who were then building the "Webster", that the location was not appropriate, that it was too near the "State" (Schine's) and not justified, and Schine said he would build a theatre near the Murray theatre (owned by independents). The "State" and the "Webster" theatres were ¾ mile apart. Schine later took over the "Webster". Schine testified he said that it would not be sensible to build the "Webster," but denied that he said he would build near the "Murray."

At Seneca Falls, after an independent had taken steps toward building a theatre, a sign was placed on the Seneca theatre, (shortly theretofore purchased by Schine) which read: "Closed for alterations. Will re-open soon as a Schine theatre." Independent then discontinued efforts to
[fol. 4891] build. "Schine" did not re-open. Practically the same things recurred two years later. The same independent took steps to build. The sign re-appeared on the "Seneca." The independent did not go through with his

plan. The "Seneca" did not open. It had not been open in several years.

After "Schine" opened a theatre within a town, it was arbitrarily able to keep the independents from opening a theatre in the town with suitable run products, as in Auburn, Lockport, Mt. Vernon, Paris and Bellefontaine.

"Schine" was able to monopolize first run product at Corbin, Medina and Lockport even though the physical facilities of the independents in those towns were better than Schine's. He was able to monopolize the first neighborhood run in Rochester even though the physical facilities of the independents were better.

The evidence discloses that "Schine" cut admission prices at Corbin, Geneva, Lexington, Malone, Ogdensburg and other towns; gave out cut rate tickets in Addison, good in his Corning theatre for students, and frequently engaged in two for ones and bank nights in other towns.

In cases of purchase or the assumption of leases other than those hereinbefore referred to, the agreements therefor provided for no competition by the independents for long periods of time. The non-competitive feature was also extended to cover outside towns, i. e.: Amsterdam, Ilion, Malone, Paris and Lexington.

By reason of franchise agreements entered into prior to May 19, 1942, (voided thereafter, see Decree herein of that date) permitting special film rentals not given independents, "Schine" was able to reap benefits unavailable to independents and these were utilized against independent [fol. 4892] operators as a means of restraint. These have a definite bearing on the competitive effect of buying power. Rather than make contracts for a single year, as appears to have been Schine's practice prior to 1936, he then began making such a period of two or three years. These contracts included both the entire circuit and also those theatres for which Schine did the booking. The great buying power of "Schine" enable him to obtain concessions not obtainable by independents. In 1936 Schine made a three year agreement with Fox, and as a result he obtained the Fox feature product in all the towns which "Schine" then operated, and this agreement was later made to include subsequently acquired theatres. In 1938 a subsequent three year agreement was made. These agreements provided for payment of certain percentage of gross receipts after deduction of operating costs, and also fixed minimum admission

charges. With Loew in 1936, a four year agreement was made under substantially the same terms as made with Fox. In 1937 a comparable three year agreement was made with Warner; in 1938 a similar one with RKO; a similar two year one with Columbia in the same year and a three year agreement was made with Universal in 1939. In the instance of United Artists, a distributing corporation, separate contracts were made for each feature for all Schine theatres. Another feature of these agreements was in the inclusion of unfair and inequitable clearance provisions.

Proofs connecting the distributors with certain of the aforesaid acts of defendants come from the provisions of the franchise agreements and acts of the distributors, interdepartment communications of the distributors and statements made by their authorized representatives, of which numerous ones have been set forth herein. It is hardly be- [fol. 4893] lievable that the executive officers of the distributors did not know some of the methods employed by "Schine" in its efforts to restrict competition. Distributors' salesmen, branch managers and district managers are necessarily in constant touch with "Schine's" operations. By the very terms of the franchise agreements they insured strength against competition. These long term deals were made by each of the distributors, except United Artists whose term deals were necessarily somewhat different, and they were in effect profit sharing agreements and created a virtual partnership with "Schine." To the same end were the unreasonable clearances given "Schine" by each of the distributors. Attention has heretofore been directed to some of these. The plaintiff has submitted in connection with its briefs papers purporting to be arbitration awards fixing clearances in certain instances and which arbitrations are purported to have been made pursuant to the Consent Decree entered in the District Court of the United States for the Southern District of New York on November 20, 1940. These arbitration awards are not in evidence. They have no binding effect as res adjudicata or otherwise, and this court has not considered them as evidence. However, it is hardly necessary to look to any other decision to support the view that clearances of 180 or 120 or 90 or 60 days are not reasonable in the instances herein in which they have been allowed. It is true some of these were clearances over third runs but many were over second run. In numerous instances these unreasonable clearances were al-

lowed over towns in which Schine did not operate, and some towns distant from 10 to upwards of 20 miles, and towns in which there were no theatres. Gloversville got clearance of 45 days over Johnstown, and "Schine" was given clearance [fol. 4894] both over Newfane and Mohawk where there were no theatres. Many clearances were over outside towns of comparably small population, distant so far that no clearance is justified, such as Randolph, Little Valley and Ellicottville, New York. Many recently were given over towns over which there had been no previous clearance. Metro gave clearance in Ashland over Londonville and Lodi, Ohio; United Artists gave clearance in Auburn over Skaneateles, New York, and Fox in Hornell over Earlville, New York.

The record is replete with inter-department communications between major film representatives which recognize the unreasonableness of the clearances given to Schine at his demand. This is shown by the communications and representations made by Lehman of United Artists, Pielow of M.G.M., Dana and Sauber of Universal, Smith of Warner, and Sussman and Grassgreen of Fox, which are admissible in evidence because these men all held positions in their respective companies so that it was within the scope of their duties to make the representations in the communications that they did as a natural incident of the office, i.e.: branch or district manager.

Pielow, MGM resident manager, wrote: "I feel that in some of the situations (unnamed) (discussing Schine contracts), the clearance that he (Lynch) is demanding is unfair * * *." Dana, branch manager of Universal wrote the district manager that he had asked Louis Schine relative to clearances over the Smalley circuit (Norwich) and that he refused to grant the privilege of serving the pictures with shorter clearance. Universal branch manager Sauber wrote Lynch that they wanted to serve Waterloo in less time than the 30 days clearance after Seneca Falls [fol. 4895] because other majors were, but Lynch refused though Universal had the right under its contract to so do. At Rochester Scully, of Universal, said it would be satisfactory if the Madison and Monroe came within the Schine 21 day clearance.

Smith, branch manager of Warner, wrote to the Home office that Canton would do more business if it were not for Schine at Ogdensburg having 30 days clearance and if it was reduced: "It will make a better condition for us all

• • • ." Smith also wrote relative to Seneca Falls stating that he hoped Lynch would break down their 60 days clearance: "As I told you this morning over the phone, the clearance set up is all wet • • •."

Sussman, of Fox, wrote to Grassgreen that the 60 day clearance in Glens Falls and elsewhere seemed excessive. Sussman went on to comment that he noted that 60 day clearance was given over second run at Malone when Fox had no second run in Malone, and furthermore, as previously stated, 60 days over second run seemed excessive. Grassgreen replied that while the 60 days at Glens Falls might seem excessive, Lynch insisted upon it. Grassgreen said that Schine insisted upon the 60 day clearance because they wanted to be consistent with their demands for 60 days over subsequent independent runs.

In certain instances the distributors refused to negotiate with the independents for runs not bought by Schine. Such are seen in the refusal of RKO, Fox, Paramount, MGM and Universal to furnish second run at Auburn; of MGM at Amsterdam until the "Schine" deal did not materialize; by United Artists at Geneva; and by RKO, Universal and Fox at Paris.

In many instances the distributors refused to negotiate with the independents for runs. After "The Circuit" came into the town, in many instances it was impossible for the [fol. 4896] independent to get a good run of major product, or even to have his requests to purchase considered. RKO would not sell to the independent after "The Circuit" came in for 1933-34 in Auburn, 1935-36 in Mt. Vernon; MGM would not sell 1930-31 in Bellefontaine, 1933-34 in Lockport and Norwich, 1935-36 in Van Wert, 1936-37 in Lexington, 1938-39 in Medina; Paramount would not sell 1933-34 in Lockport, 1934-1935 in Auburn, 1935-36 in Mt. Vernon; Fox would not sell 1933-34 in Norwich, 1935-36 in Amsterdam and Mt. Vernon; Universal would not sell 1933-34 in Lockport, and Norwich; United Artists would not sell 1935-36 in Mt. Vernon and Van Wert; and Warner would not sell 1933-34 in Norwich, 1936-36, 1935-36 in Amsterdam, 1938-39 in Medina and 1941 in Norwich. In these instances, when the independent attempted to make application for product, he was simply advised that the product had been sold to "Schine" in a circuit deal.

Special privileges were granted, as in the option of paying a percent. of the gross receipts from product or flat

rental, and as in deducting cost of competitive devices (bank nights, etc.) from gross before computing the distributor's share.

Special license provisions were given by tying up second runs, as in Lockport and Corning.

In certain instances Schine's film contracts called for lower minimum admission charge than those for the independent for subsequent run. This happened in Lexington and Corning.

United Artists with respect to the Capitol theatre in Ilion wrote: "We do not want to encounter any difficulty with the Schine Circuits * * *, we want to be definitely assured that the clearance as submitted in the contracts is satisfactory to the Schine Company."

[fol. 4897] Sichelman, assistant sales manager for Fox, wrote Schine that Fox was free to sell ten pictures of first run and also 100% second run in Bellefontaine and that the branch manager was being directed to sell these. In reply, Lynch said, in part: "The only product which he (independent) has been able to buy has been from independent companies. There has not been a major company that has sold him any product. * * * We are charging a top of 40¢ admission * * * and we don't want to have the distributing companies make it impossible for us to continue getting this price. * * * I have also written Mr. Schmertz advising him that we will take the remaining pictures which we did not buy first run, and, have also asked him to refrain from selling this second run house." Lynch also wrote to the Fox branch manager asking him to hold off selling the independent.

Further, Lynch wrote United Artists that "Schine" "should be allowed the privilege of playing pictures ahead of a situation (Sodus) charging a lesser admission price." To this the reply, in part, was: "Therefore, in the future, we will grant you fourteen days, or whatever clearance you see fit to take on towns like Elmira etc. in that locality." The Fox home office wrote its branch with reference to Glens Falls, second run: "I note that you have changed the clearances hereby providing for sixty days over third run Glens Falls. Sixty days clearances here and elsewhere seem to be excessive.", and to this the branch manager replied that Schine always provided for this clearance over third run and "George Lynch insisted in carrying it through for the future."

There is much other evidence going to show the influence of "Schine" with the distributors to gain preference over [fol. 4898] independent competitors and also the cooperation of the distributors with "Schine" to the same end.

Sales managers for each of the major distributors who had authority to approve film leases, called by the defendants, gave testimony, in substance, that to their knowledge there has not been any conversations with and defendants or their executives or employees not to deal with any competing exhibitors to restrict the terms of such dealings. These sales managers can be only a small number of those employed as such during the period in question, and they speak only of their own knowledge. Some six branch and exchange managers have testified as to transactions in contradiction of the plaintiff's proof as to five of the situations in question. In Interstate Circuit v. United States, supra, the court said that the failure to call those officers who had authority to act for the distributors and were in a position to know whether they acted in pursuance of an agreement "is itself persuasive that their testimony, if given, would have been unfavorable to appellants." While that case was stronger with respect to the proof in this connection, the defense herein is weakened both by the failure to call others of the officers authorized to act and by the nature of the testimony given by these. "The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. * * * Silence then becomes evidence of the most convincing character." Interstate Circuit v. United States, supra.

Proof herein that these defendants conspired is shown by something more than inferences, and this together with the reasonable inferences to be drawn from the direct proof, suffices to show intent to conspire.

[fol. 4899] It is recognized that the matter of clearances is of major importance in the consideration of the issues herein. One position taken by the defendants is that adequate relief in so far as clearances are concerned may be had under the Consent Decree hereinbefore mentioned in United States v. Paramount Pictures, Inc., et. al. Such Consent Decree was for a trial period of three years from the date of its entry, and it further provided that during such period the petitioner, the United States, would not seek any relief prayed in certain sections of the petition and of the amended and supplemental complaint and in

certain other directions. After the expiration of said three year period, the government filed an application for modification of the decree. The defendants therein not admitting the existence of violations to which the application for modification was primarily directed, the suit as originally brought has been continued and has not yet been determined. This seeks the divorcement of theatres from the film producing companies. It is to be noted that Columbia, Universal and United Artists were not parties to the Consent Decree, and as heretofore noted the other major distributors originally parties defendant in this suit have been dropped as such. The arbitration features have continued to remain in effect since the expiration period by agreement of the parties, and so far as the record discloses there has been no arbitration under this Decree of any clearances involved herein existing at any time. We are called upon in this suit to decide whether there were any violations by these defendants of the law as laid in the complaint. Paramount et al. are not parties here. The violations herein are alleged to have occurred prior to the date of the Consent Decree. There is now no method by which either party can [fol. 4900] compel arbitration. The action taken in the adoption of the Consent Decree and the present availability of arbitration by agreement, however, do have a bearing on the extent of the judgment or decree to be made herein.

Some of the major companies are exhibitors as well as distributors. The government by the Consent Decree entered in an agreement setting up procedure purported to provide a fair and equitable sale, distribution and showing of pictures to all distributors. Just what was accomplished by the Decree, other than some arbitration of clearances, does not appear. The government in entering into the Consent Decree evidently contemplated that such decree would obviate the necessity of a trial of the issues and intended to let by-gones be by-gones. As compared with some of the major distributors, these defendants when combined are relatively small. The Consent Decree, therefore, brings up the question of whether the harsh determination of dissolution as urged by the government should be compelled or whether some adjustment or re-organization can be agreed on or fixed by the court which will as definitely as possible prevent future violations.

The motion picture business in production, distribution and exhibition has come to be a leading industry in this

country. The producer-distributors and chains of exhibitors occupy positions from which "monopolization" is easily brought about. Each have lawful advantages which are sufficiently remunerative. The public, as well as the individual independent exhibitor, has an interest in fair competition, and it is entitled to have exhibitions at reasonable prices, well selected products and reasonable clearances between available theatres. A theatre owner naturally seeks to furnish those pictures which attract the greatest revenue. The record does not disclose any different attitude [fol. 4901] on the part of "Schine". The record does not disclose that it has not furnished sufficiently attractive entertainment. Fair competition should benefit the public, but "monopolization" when exercised by a strong wide reaching organization or group of affiliated organizations crushes or weakens opposition, eliminates fair competition to the disadvantage of the public and the individual competitor.

The defendants have maintained an unlawful combination among themselves and with their affiliated corporations and have monopolized the licensing of the exhibition of motion picture films in various cities and towns in violation of the aforesaid sections of the Sherman Act and, through the unlawful combination between themselves and their affiliates by their predatory practices, have monopolized the business of operating motion picture theatres in various towns and have attempted to monopolize in various other towns; and the defendants have contracted, conspired and combined with each other and their affiliated corporations and with each of the aforesaid major film corporations for the purpose, and with the effect of suppressing competition and monopolizing exhibition of films distributed by each of said film corporations in various towns and cities, in violation of the aforesaid statute.

The plaintiff is entitled to a judgment enjoining the defendants:

(1) from monopolizing the supply of major first run films in any situation where there is a competing theatre suitable for first run exhibition thereof, and from monopolizing the supply of second run films in any situation where there is a suitable theatre for second run exhibitions thereof;

(2) from demanding or receiving clearance over theatres operated by others which unreasonably restrict their

[fol. 4902] ability to compete with a theatre owned or operated by a defendant, or corporation controlled by it;

(3) from conditioning the licensing of films in any competitive situation, outside of Buffalo, New York, upon the licensing of films in any other situation;

(4) from selling or acquiring any theatre interests pending the further order of this Court;

(5) from enforcing any existing agreements heretofore entered into by the defendants not to compete, or to restrict the use of any real estate to non-theatrical purposes; from the use of any threats or deception as a means whereby a competitor is induced to sell;

(6) from continuing the heretofore described "conspiracy" or "monopolization" in restraint of trade and commerce between the states and the entering into any combination or conspiracy for the purpose or with the effect of restraining trade and commerce between the states;

(7) and directing the entering of a decree adjudging that the defendants and their affiliated corporations be dissolved, re-aligned or reorganized in their ownership and control, so that fair competition between them and other theatres be restored and hereafter maintained; and that the determination of the question of the dissolution, re-alignment of reorganization of the parties aforesaid and the method to be employed in the accomplishment of the same be left to be fixed by this court after further consideration with the parties.

As to the objections of the defendants that certain testimony is hearsay, it is to be said this was received in evidence on the explicit statement of the attorneys for the government that the authority to make the statements and write the communications would be shown. The Court [fol. 4903] reserved the right to strike out in default of making of such connections. This connection has not been made in certain instances, and the court is attaching and submitting herewith a statement of its action with respect thereto. However, it is believed that the exclusion or inclusion of this testimony does not affect the decision on the issues.

In the instant case voluminous records of the distributors were received in evidence on stipulation of the parties. These, among others, included many agreements made by the distributors with the defendants and others. Various

interdepartment communications to which objections were made were properly received as a part of the record of the distributors, and further many of them were made by officials acting in their ordinary and usual capacity as representatives of the distributors. Acceptance of this type of evidence is supported by many authorities. Murray v. United States, 10 F, (2d) 409, cert. denied 271 U S. 673; Lewis v. United States, 38 F. (2d) 406; Johnson v. J. H. Yost Lumber Co., 117 F. (2d) 53; Patterson v. United States, 222 F. 599, cert. denied 238 U. S. 635; United States v. Corn Products Refining Co., 234 F. 964; Hartford Empire Co. v. United States 323 U. S. 386.

The parties herein have heretofore submitted lengthy proposed Findings of Fact and Conclusions of Law. It seems that it would simplify matters if, in the light of this opinion, new Findings were submitted. This seems specially advisable because of the numberous situations involved in the suit. However, this matter will be left to the desires of counsel.

October 8, 1945.

——, United States District Judge.

[fol. 4904] Acting upon the objections made by defendants, the following are stricken from the record:

Testimony by Long (R. 127) that Granger, Fox general sales manager, told him that Fox could not afford to give up $50,000 worth of business in order to get $5,000.

Testimony by Dasher (R 352-353) that MGM branch manager Drew told him, "Schine has 60 theatres, you have got one. What do you expect us to do."

Testimony by Cohen (R 3201) that Seed, Warner exchange manager, told him that Schine would pay $25.00 more if Warner did not sell the independent.

Testimony by De Toto (R 808-809) as to what Lehman said Schine was going to do in relation to opening additional theatres.

Testimony by Moore (R 383-384) as to what "Schine" asked that Metro hold (product) for them.

Testimony by Ayres (R 2963-2970) relative to the showing of Metro picture "Gone With The Wind".

Testimony by Warner (R 2350-2355) relative to his being called before the Film Board of Trade by a representative of RKO for a violation of the National Recovery Act in selling "two for one" tickets.

While we have generally held in favor of inter-office communications or memoranda, certain of them are hearsay and are stricken out:

In exhibit 370; "Lynch claims that he does not want a second run policy to prevail at the second run opposition and has promises from other major companies that they will not sell second run" is stricken.

[fol. 4905] Exhibit 456 refers in part to the fact that the independent told the local branch manager that he might be forced to charge 10¢ balcony and 15¢ main floor at night in order to meet his competition, and that is stricken.

The part of exhibit 519 which refers to the opinion of the branch manager that conditions were "chaotic" is not evidence against "Schine."

Exhibits 163, 229, 542, 546 and 554 are not stricken but are strictly construed. We believe them to be within the authority of the distributor's agent to make such statements, being incident to their scope of authority.

Objection was frequently made to the testimony by the independent that when he requested product of the exhibitor, he was told that it had been sold to "Schine". It is not felt that this is hearsay or beyond the scope of authority of the branch or district manager or of the salesman. He knew that it was sold, and to whom. The statement that it was sold is admissible, and it is also admissible to state to whom it had been sold.

John Knight, U. S. D. J.

[fol. 4906] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

CERTIFICATE OF CLERK

I, May C. Sickmon, Clerk of the United States District Court for the Western District of New York, do hereby certify that no Notice of Settlement of the Findings of the Court and Judgment submitted by the Plaintiff to the District Court on or about the 24th day of October, 1945 was filed by the Plaintiff in the District Court.

In Witness Whereof I have hereunto set my hand and the seal of this Court this 2nd day of July, 1946.

May C. Sickmon.

Subscribed and sworn to before me this 2nd. day of July, 1946. Margaret E. Baysor, Notary Public—Niagara County. Certificate filed in Erie Co., N. Y.

[fol. 4907] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO CERTAIN FACTS

It Is Hereby Stipulated between the parties hereto, by their respective counsel, that the following facts may be made a part of the record on appeal:

(1) Plaintiff's proposed findings, described as Item 7 in the supplemental praecipe filed by the defendants herein on June 26, 1946, were forwarded to Judge Knight with a covering letter dated October 24, 1945, a copy of which is attached hereto and marked Exhibit "A".

(2) A copy of the foregoing letter and said findings was sent to counsel for the defendants with a letter dated October 25, 1945, but was not received by Mr. McKay until October 29, 1945.

(3) On October 30, 1945, Mr. McKay wrote a letter to the Court with respect to said proposed findings, a copy of which is attached hereto as Exhibit "B", and a copy of which was sent to and received by plaintiff.

(4) A copy of plaintiff's proposed amended findings and proposed amended judgment was sent to counsel for the defendants by the plaintiff on March 19, 1946 and received by them within a few days thereafter.

(Sgd.) Willard S. McKay, Counsel for Plaintiff.
Robert L. Wright, Counsel for Defendants.

Dated, Sept. 6, 1946.

[fol. 4908] EXHIBIT "A"

60-6-30-33-10

October 24, 1945.

Honorable John Knight, United States District Judge,
Western District of New York, Buffalo, New York.

Re: United States v. Schine Theatres, Inc.

DEAR JUDGE KNIGHT:

Enclosed are findings and a judgment in the above case which we have prepared in accordance with the Court's opinion of October 8, 1945 and Rule 52a of the Federal Rules of Civil Procedure. In these documents, we have only undertaken to reflect literally the views of the Court as expressed in its opinion and are enclosing a mimeographed copy of the opinion to which page references are made following each paragraph of the findings in question. Although we shall probably wish to be heard upon proposals to amend the findings and judgment provided for in the opinion in minor respects, Rule 52b provides that any party may be heard as to the ultimate form that the findings and judgment shall take by appropriate motions filed within ten days after the entry of the judgment. We therefore suggest that the prompt entry of a judgment in some form is essential to a reasonably expeditious final determination of the suit.

You will note that we have expressly provided in the judgment for further hearings by the Court after the parties have submitted concrete plans for accomplishing the dissolution directed by the Court and filed such objections and counter proposals to the plans submitted as they desire to bring to its attention. In this connection, we have suggested no time limitations as the opinion indicated none but believe that sixty days for the submission of plans and thirty days thereafter for filing of objections are appropriate limits.

We have sent copies of the enclosed findings, judgment and opinion and this letter to the defendants' counsel with suggestion that they advise you directly of their views as to the procedure.

As previously indicated, insofar as they desire to raise any questions as to the ultimate form of the findings and judgment, we assume that this will be done by formal mo-

tions under Rule 52b after the entry of this judgment. We shall, of course, appreciate receiving a copy of the findings and judgment in the form in which they are respectively filed and entered by the Court together with the date of entry as promptly as possible after the entry.

Sincerely Yours, Wendell Berge, Assistant Attorney General.

[fol. 4909] EXHIBIT "B"

October 30, 1945.

606-30-33-10.

Honorable John Knight, United States District Judge, United States Court House, Buffalo, New York.

Re: United States States v. Schine Chain Theatres, Inc.

MY DEAR JUDGE KNIGHT:

Yesterday I received a letter dated October 25, 1945 from Wendell Berge, Esq., Assistant Attorney General, enclosing a copy of a letter from him to your Honor, dated October 24, 1945, together with copies of the enclosures referred to therein. These enclosures include copies of new proposed findings, and a copy of a proposed judgment.

The plaintiffs apparently take the position that proper procedure is for the Court to enter judgment without having found the facts specially, as provided by Rule 52, and then to put the burden upon the defendants of convincing the Court that some or all of the provisions of the judgment should be modified. The defendants strenuously disagree with this position. It is clear that under Rule 52 and the decisions construing the same, judgment cannot be entered until the Court has specially found the facts, and stated separately its conclusions of law upon the basis of which judgment is to be entered.

Counsel are now actively engaged in examining your Honor's opinion and preparing new proposed findings, as suggested in the final paragraph thereof, and we would probably have had our suggestions ready for submission to your Honor at this time, had it not been for the fact that the undersigned has only recently been discharged from the hospital after an operation which caused his confinement for slightly over three weeks, and which has seriously limited his activities since then.

At first glance, it appears that the plaintiff has done nothing more than to take your Honor's opinion which consists of a discussion both of the law and of the facts and to split it up with occasional eliminations and interpolations under the guise of proposed findings of fact, without attempting to separate the facts from the law.

The findings which we submitted originally were quite complete, and of course extensive, and it will require another ten days for us to revamp them in the light of your Honor's opinion.

We are sending a copy of this letter to plaintiff's counsel.

We trust that this will be satisfactory to your Honor.

Respectfully yours, —— ——.

[fol. 4910] IN UNITED STATES DISTRICT COURT

[Title omitted]

Findings of the Court—October 31, 1945

FINDINGS OF FACT

1. The defendants in this suit are: Schine Chain Theatres, Inc., a New York holding and service corporation, five other corporations in which Schine Chain Theatres, Inc. owns all of the stock, to wit, Schine Theatrical Co., Inc., an operating company, Schine-Lexington Corporation, a holding company, Schine Enterprise Corporation, a service corporation, Schine Circuit, Inc., a service corporation, and Chesapeake Theatre Corporation, a holding corporation; and also three individuals J. Meyer Schine, Louis Schine and John A. May. Hereinafter the corporate defendants will sometimes be referred to as "Schine," the "Schine Circuit" or as "the Circuit." (p. 1 and 2.)

2. From 1920 to 1941 these defendants acquired, either as purchaser or as lessee, an interest in 175 theatres and in addition some 42 separate parcels of real estate for theatre purpose, or connected with such purpose. (p. 2.)

3. Since 1931, there have been 118 theatre corporations in which an interest has been acquired by "Schine." As of the time of the commencement of this suit there were 62 of such operating corporations and in 48 of these "Schine"

[fol. 4911] owned 100 per cent of the stock, in 12, 50 per cent. Schine operates 93 theatres in 73 towns (including cities). The towns run generally in population from 5000 to 3500, and include 39 in New York, 16 in Ohio, 8 in Kentucky, 7 in Maryland, 2 in Delaware and 1 in Virginia. In addition to its theatrical and realty operations, "Schine" has booked and bought for and supervised 37 theatres since 1931, and when this suit was brought there were 27 for which it so acted. Since 1928 the closed towns (those in which there was no opposition) show a total increase of 56. In 1941 there were only 3 towns in which Schine's competitors (hereinafter called independents) were playing major film product. (p. 2 and 3.)

4. In a single season, 1939-1940, Schine paid $1,647,000 to six film companies. These defendants together control the largest independent theatre circuit in the country. For theatre acquisitions and capital improvements there has been expended admittedly upwards of $10,948,100, not including divident payments on operating expenses and cash on hand. (p. 3.)

5. There are eight so-called major film companies: Fox, Loew, Paramount, RKO, Warner, Columbia, Universal and United Artists, which supply Schine a large per cent of the feature films used by Schine and together receive upwards of 75 per cent of the total film rental paid by Schine. The principal sales office of each is in New York City and the method of licensing and servicing of films is similar with each except that United Artists Licenses its films subject to the approval of the respective producers of whose film it distributes. The feature films are mostly produced in California where the negatives are taken, the prints being generally manufactured in New York and New Jersey. Film license applications are solicited by salesmen from the branch office, and the delivery and return of films are made through the branch. Prints of films are sent from the [fol. 4912] various exchange offices in the various states to the exhibitors of the main office and all contracts are subject to approval by the main office at New York although the recommendations for approval ordinarily are made by the branch manager who is close to the situation. Prior to the 1941-1942 season it was the usual custom for all of the distributors to make license agreements for feature films for a period of a year commencing about September of each

year, which license agreements were ordinarily made before the film was produced. Since that season the films of Fox, Loew, Paramount, RKO and Warner have been licensed in blocks generally not exceeding five in number rather than in season blocks. (p. 3-4.)

6. The individual defendants hold the principal offices in the defendant corporations and hold other offices in the various so-called local corporations. They are the principal stockholders in the parent corporation and have general supervision of the operations of the circuit. The film buying for the circuit and the companies in which it had an interest was conducted through "Schine" or one of its subsidiaries. Lazar, a regional manager for "Schine" covering several states, and Silverman and Hensler, district managers, and one Insley, principally carried on negotiations for acquisitions, though the defendants Schine and May engaged directly in some, while one Lynch was "the Circuit's" chief film buyer. In circuit buying "Schine" generally negotiated deals with the division manager. The agreements so made are referred to as "master agreements and deal sheets," but these were usually followed by license agre-ments signed by the chief sales executive of the distributors. (p. 4-5.)

7. The great film buying power of the defendant corporations gave opportunity to exert pressure on the distrib- [fol. 4913] utors to obtain preferences. The extent of this film buying is demonstrated by the exceeding large number of theatres controlled by "Schine" and the large amount of money which must have been paid for film rentals. This buying power included both closed and open towns. By combining the open and closed towns in Schine's deals with the distributors, Schine was enabled to dictate terms to the distributors. This ability to dictate terms was further increased by the authority of Schine to buy products for theatres not owned or operated by it. Schine acquired by purchase or lease 55 theatres from 1922 to 1932, and 80 from 1936 to 1941, inclusive, 15 in 1938 and 15 in 1939. (p. 12-13.)

8. The means and methods employed by the different defendant corporations through their officers and authorized representative to obtain a "monopolistic" control were numerous. Principally among these were arbitrarily

depriving independents of first and second run pictures, securing unreasonable clearances, making threats to build or open closed theatres to prevent construction or operation by independents, lowering admission prices, obtaining rental concessions, restricting independents who sold to Schine as to periods and places of operation, making long time franchise agreements covering the "Circuit." (p. 13.)

9. Some specific instances showing the predatory means used by "Schine" follow:

(a) The Schine defendants arbitrarily deprived independents of the first run products which they had previously enjoyed in several towns. Independents were deprived of 1936-37 Columbia product at Norwalk; 1935-36 Fox product at Van Wert and Bucyrus; Loew's product for 1930-31 at Bellefontaine and for 1935-36 at Van Wert; Paramount's 1935-36 product at Van Wert and Bucyrus; [fol. 4914] RKO product for 1933-34 at Auburn and 1935-36 at Norwalk; of United Artists 1936-37 at Norwalk; and of Warner for 1933-34 at Norwich, 1936-37 at Norwalk, and 1941-42 at Harlan. Independents were arbitrarily deprived of second run products which they had previously exhibited, losing 1938-39 Columbia at Rochester, Loew's 1935-36 at Van Wert and 1934-35 Warner at Watertown. After "Schine" secured the product from the independents for the aforementioned seasons, he retained it and the independent was unable to secure it in subsequent seasons. Relative to six towns including Corning, Lynch wrote on October 21, 1933, Metro: "If there are any other opposition towns where you believe you can sell a second run, I would appreciate it if you would take the matter up with me first before selling." In 1932 Lynch wrote Flynn a letter saying, among other things: "I want you to refrain from selling him (independent) any pictures whatsoever." And Metro through Flynn agreed not to do so. Lynch also wired Fox to withhold selling to this independent and wrote Fox' agent saying "have also asked him (Schmertz-Fox agent) to refrain from selling this man second run." (p. 13-14.)

(b) "Schine" was able to secure unreasonable clearances year after year in many towns. A few only need be mentioned. At Corning, New York, RKO permitted 90 to 180 days, and Fox permitted 160 days. At Seneca Falls, New York, Columbia and United Artists permitted 120 days. At Little Falls, New York, RKO, Columbia and Universal per-

mitted 120 days and United Artists permitted 115 days. At Carthage, RKO permitted 120 days and United Artists 90. United Artists permitted 90 days at Watertown, New York, and 90 days at Amsterdam, New York; Bucyrus, Kent, Norwalk, Tiffin and Fostoria, Ohio; and Lexington and Van Wert, Kentucky. (p. 14-15.) Schine got clearance for Herkimer over Ilion where none existed before.

[fol. 4915] (c) The license contracts with "Schine" in many instances specified minimum admission prices for the various runs as well as clearance periods. This affects adversely the time given the competitor. (p. 15.)

10. "Schine" made threats to build in various towns, such as Paris, where there was a sign up, Canandaigua by a sign and newspaper article published, and where he eventually did build. In Perry, a statement by May and a newspaper article announcing that land had been bought for theatre purposes came at a time when "Schine" was trying to purchase the independent's lease. "Schine" did not build, but later got the lease. In Salamanca, just after independents acquired a site for a contemplated theatre, through the press "Schine" announced its intention to build. In Medina, "Schine" announced the making of an agreement to erect a new theatre immediately after independents started construction. In Mount Vernon, May contacted the independent to buy, saying "Schine" would build unless the deal could be put through. (p. 15.)

11. Defendants' authorized agents made statements to independents which are reasonably construed as threats.

(a) At Bellefontaine, during negotiations for the renewal of a lease with an independent, Lazar threatened to re-open the Opera House, if the independent opened the Strand. (p. 15.)

(b) With reference to Paris, Lazar told the independent, who was taking steps to build, that if the independent went ahead with his projects "Schine" would build a 1200 seat theatre in Lexington where the independent had a theatre and that the house would be run with 10¢ policy at all times. At Paris, Schine and an independent began construction at practically the same time. Lazar asked the independent to stop construction and see him about a deal. [fol. 4916] Subsequently Schine took over the independ-

ent's Lexington and Paris theatres under an agreement prohibiting for fifteen years the independent from engaging in the theatre business in any town in Kentucky where Schine had a theatre. (p. 16.)

(c) Just before Schine acquired the "Forum" theatre in Norwalk, Lazar advised an independent to "get in with us * * * we are a big company. You know what it means if you are not in with us," and further stated: "If you lease your theatre Mr. William Selman (part owner of the "Forum") will walk out of town." (p. 16.)

(d) At Van Wert, the operator of the "Ohio" theatre could not get first run product it had had. During negotiations for the sale of the "Ohio" to Schine, Lazar said that Moore would have trouble getting product; Schine would have the first runs; and that Schine was interested in buying in order to raise prices. (p. 16.)

(e) At Lockport, during negotiations with "Schine" for the "Palace theatre, May said it would be necessary to re-open the Hi-Art owned by "Schine" to use up "the large volume of product they had bought." This statement evidently was made to induce Reliance to sell the "Palace." In this instance it is to be noted that the independents experienced great difficulty in getting product. Hi-Art had then been closed for seven years. Metro, Fox, Universal and Loew's refused major product to the independent. Indicative of the attitude of the distributors is the letter from the Eastern Salesmanager of Loew's who wrote:

> "In our negotiations with the Schine interests it will very likely be that we will have to give them consideration for our product at Lockport, as well as other situations, and as we are hardly in a position to forego or jeopardize the business from their other situations, [fol. 4917] and for the further reason that they have for a number of years been a very representative account, we feel that our interests would be best served by giving them such consideration."

(f) At Perry, May told the independent that "Schine" had bought a lot to built a 1000 seat theatre there. This was a town of less than 5000 population. The independent theatre building was owned by the town and leased to the independent. When May said this, a local newspaper ar-

ticle to the same effect was given out. Schine did not build but Herzberger sold shortly thereafter, and through the purchaser of this interest Schine acquired the lease. (p. 17.)

(g) Insley and May tried to buy an independent's theatre at Seaford and Georgetown. Insley said it was foolish that the independent did not make a deal with "Schine" because he had recently purchased the theatre at Laurel and "very likely, with the buying power they had they would get away the product" from the independent. Insley said Schine had bought a lot with the intention to build a theatre in Seaford, and also said: "Well, if I were you I would sell the theatres to Schine because they are going to build a theatre there and, naturally, they are going to get the product." Insley, under a written contract with "Schine" had authority "in negotiations for the acquisition of motion picture theatres within the above-described territory (Delaware, Maryland, Virginia). Seaford and Georgetown are in Delaware. (p. 17-18.)

(h) At Rochester, J. Meyer Schine told independents, who were then building the "Webster," that the location was not appropriate, that it was too near the "State" (Schine's) and not justified, and Schine said he would build a theatre near the Murray theatre (owned by independ-[fol. 4918] ents). The "State" and the "Webster" theatres were ¾ mile apart. Schine later took over the "Webster." Schine testified he said that it would not be sensible to build the "Webster," but denied that he said he would build near the "Murray." (p. 18.)

(i) At Seneca Falls, after an independent had taken steps toward building a theatre, a sign was placed on the Seneca theatre, (shortly theretofore purchased by Schine) which read: "Closed for alterations. Will re-open soon as a Schine theatre." Independent then discontinued efforts to build. "Schine" did not re-open. Practically the same things recurred two years later. The same independent took steps to build. The sign re-appeared on the "Seneca." The independent did not go through with his plan. The "Seneca" did not open. It had not been open in several years. (p. 18.)

12. After "Schine" opened a theatre within a town, it was arbitrarily able to keep the independents from opening a theatre in the town with suitable run product, as in Au-

burn, Lockport, Mt. Vernon, Paris, and Bellefontaine. (p. 18.)

13. "Schine" was able to monopolize first run product at Corbin, Medina and Lockport even though the physical facilities of the independents in those towns were better than Schine's. He was able to monopolize the first neighborhood run in Rochester even though the physical facilities of the independents were better. (p. 19.)

14. "Schine" cut admission prices at Corbin, Geneva, Lexington, Malone, Ogdensburg and other towns; gave out cut rate tickets in Addison, good in his Corning theatre for students, and frequently engaged in two for ones and bank nights in other towns. (p. 19.)

[fol. 4919] 15. In cases of purchase or the assumption of leases other than those hereinbefore referred to, the agreements therefor provided for no competition by the independents for long periods of time. The non-competitive feature was also extended to cover outside towns; *i. e.:* Amsterdam, Ilion, Malone, Paris, and Lexington. (p.19.)

16. By reason of franchise agreements entered into prior to May 19, 1942, (voided thereafter, see Decree herein of that date) permitting special film rentals not given independents, "Schine" was able to reap benefits unavailable to independents and these were utilized against independent operators as a means of restraint. These have a definite bearing on the competitive effect of buying power. Rather than make contracts for a single year, as appears to have been Schine's practice prior to 1936, he then began making such for a period of two or three years. These contracts included both the entire circuit and also those theatres for which Schine did the booking. The great buying power of "Schine" enabled him to obtain concessions not obtainable by independents. In 1936 Schine made a three year agreement with Fox, and as a result he obtained the Fox feature product in all the towns which "Schine" then operated, and this agreement was later made to include subsequently acquired theatres. In 1938 a subsequent three year agreement was made. These agreements provided for payment of certain percentages of gross receipts after deduction of operating costs, and also fixed minimum admission charges. With Loew in 1936, a four year agreement was made under substantially the same terms as made with

Fox. In 1937 a comparable three year agreement was made with Warner; in 1938 a similar one with RKO; a similar two year one with Columbia in the same year and a three year agreement was made with Universal in 1939. In the [fol. 4920] instance of United Artists, a distributing corporation, separate contracts were made for each feature for all Schine theatres. Another feature of these agreements was the inclusion of unfair and inequitable clearance provisions. (p. 19-20.)

17. In numerous instances unreasonable clearances were allowed to Schine over towns in which Schine did not operate, and some towns distant from 10 to upwards of 20 miles, and towns in which there were no theatres. Gloversville got clearance of 45 days over Johnstown, and "Schine" was given clearance both over Newfane and Mohawk where there were no theatres. Many clearances were over outside towns of comparably small population, distant so far that no clearance is justified, such as Randolph, Little Valley and Ellicottville, New York. Many recently were given over towns over which there had been no previous clearance. Metro gave clearance in Ashland over Loudonville and Lodi, Ohio; United Artists gave clearance in Auburn over Skaneateles, New York, and Fox in Hornell over Earlville, New York. The record is replete with inter-department communications between major film representatives which recognize the unreasonableness of the clearances given to Schine at his demand. This is shown by the communications and representations made by Lehman of United Artists, Pielow of M. G. M., Dana and Sauber of Universal, Smith of Warner, and Sussman and Grassgreen of Fox, which are admissable in evidence because these men all held positions in their respective companies so that it was within the scope of their duties to make the representations in the communications that they did as a natural incident of the office, *i. e.:* branch or district manager. Pielow, MGM resident manager, wrote: "I feel that in some of the situations (unnamed) (discussing Schine contracts), the clearance [fol. 4921] that he (Lynch) is demanding is unfair * * *." Dana, branch manager of Universal wrote the district manager that he had asked Louis Schine relative to clearances over the Smalley circuit (Norwich) and that he refused to grant the privilege of serving the pictures with shorter clearance. Universal branch manager Sauber wrote Lynch

that they wanted to serve Waterloo in less time than the 30 days clearance after Seneca Falls because other majors were, but Lynch refused though Universal had the right under its contract to do so. At Rochester, Scully, of Universal, said it would be satisfactory if the Madison and Monroe came within the Schine 21 day clearance. Smith, branch manager of Warner, wrote to the Home office that Canton would do more business if it were not for Schine at Ogdenburg having 30 days clearance and if it was reduced: "It will make a better condition for us all * * *." Smith also wrote relative to Seneca Falls stating that he hoped Lynch would break down their 60 days clearance: "As I told you this morning over the phone, the clearance set up is all wet * * *." Sussman, of Fox, wrote to Grassgreen that the 60 day clearance in Glens Falls and elsewhere seemed excessive. Sussman went on to comment that he noted that 60 day clearance was given over second run at Malone when Fox had no second run in Malone, and furthermore, as previously stated, 60 days over second run seemed excessive. Grassgreen replied that while the 60 days at Glens Falls might seem excessive, Lynch insisted upon it. Grassgreen said that Schine insisted upon the 60 day clearance because they wanted to be consistent with their demands for 60 days over subsequent independent runs. (p. 21-23.)

18. In certain instances the distributors refused to negotiate with the independents for runs not bought by Schine. Such are seen in the refusal of RKO, Fox, Paramount, [fol. 4922] MGM and Universal to furnished second run at Auburn; of MGM at Amsterdam until the "Schine" deal did not materialize; by United Artists at Geneva; and by RKO, Universal and Fox at Paris. (p. 23.)

19. In many instances the distributors refused to negotiate with the independents for runs. After "The Circuit" came into the town, in many instances it was impossible for the independent to get a good run of major product, or even to have his requests to purchase considered. RKO would not sell to the independent after "The Circuit" came in for 1933-34 in Auburn, 1935-36 in Mt. Vernon; MGM would not sell 1930-31 in Bellefontaine, 1933-34 in Lockport and Norwich, 1935-36 in Van Wert, 1936-37 in Lexington, 1938-39 in Medina; Paramount would not sell 1933-34 in Lockport, 1934-35 in Auburn, 1935-36 in Mt. Vernon; Fox would

not sell 1933-34 in Norwich, 1935-36 in Amsterdam and Mt. Vernon; Universal would not sell 1933-34 in Lockport, and Norwich; United Artists would not sell 1935-36 in Mt. Vernon and Van Wert; and Warner would not sell 1933-34 in Norwich, 1935-36 in Amsterdam, 1938-39 in Medina and 1941 in Norwich. In these instances, when the independent attempted to make application for product, he was simply advised that the product had been sold to "Schine" in a circuit deal. (p. 23-24.)

20. Special privileges were granted, as in the option of paying a per cent of the gross receipts from product or flat rental, and as in deducting cost of competitive devices (bank nights, etc.) from gross before computing the distributor's share. (p. 24.)

21. Special license provisions were given by tying up second runs, as in Lockport and Corning. (p. 24.)

22. In certain instances Schine's film contracts called for lower minimum admission charge than those for the inde- [fol. 4923] pendent for subsequent run. This happened in Lexington and Corning. (p. 24.)

23. United Artists with respect to the Capitol theatre in Ilion wrote: "We do not want to encounter any difficulty with the Schine Circuit * * *, we want to be definitely assured that the clearance as submitted in the contracts is satisfactory to the Schine Company." (p. 23-24.)

24. Sichelman, assistant sales manager for Fox, wrote Schine that Fox was free to sell ten pictures of first run and also 100% second run in Bellefontaine and that the branch manager was being directed to sell these. In reply, Lynch said, in part: "The only product which he (independent) has been able to buy has been from independent companies. There has not been a major company that has sold him any product. * * * We are charging a top of 40¢ admission * * * and we don't want to have the distributing companies make it impossible for us to continue getting this price. * * * I have also written Mr. Schmertz advising him that we will take the remaining pictures which we did not buy first run, and, have also asked him to refrain from selling this second run house." Lynch also wrote to the Fox branch manager asking him to hold off selling the independent. (p. 25.)

25. Lynch wrote United Artists that "Schine" should be allowed the privilege of playing pictures ahead of a situation (Sodus) charging a lesser admission price." To this the reply, in part, was: "Therefore, in the future, we will grant you fourteen days, or whatever clearance you see fit to take on towns like Elmira etc. in that locality. (p. 25.)

26. The Fox home office wrote its branch with reference to Glens Falls, second run: "I note that you have changed the clearances hereby providing for sixty days over third run Glens Falls. Sixty day clearances here and elsewhere [fol. 4924] seem to be excessive", and to this the branch manager replied that Schine always provided for this clearance over third run and "George Lynch insisted in carrying it through for the future." (p. 25-26.)

27. There is much other evidence going to show the influence of "Schine" with the distributors to gain preference over independent competitors and also the cooperation of the distributors with "Schine" to the same end. (p. 26)

28. As compared with some of the major distributors[1] these defendants when combined are relatively small. Some of the major companies are exhibitors as well as distributors. The producer-distributors and chains of exhibitors occupy positions from which monopolization is easily brought about. (p. 28.)

29. The record does not disclose that Schine did not seek to furnish its patrons with those pictures which attracted the greatest revenue or that it has not furnished sufficiently attractive entertainment. (p. 29.)

Conclusions of Law

1. The court has jurisdiction of this cause under the provisions of the Act of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," hereinafter referred to as the Sherman Act.

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[1] The term "major distributors" as used herein refers to the distributors known in the trade as Fox, Loew, Paramount, RKO, Warner, Columbia, Universal and United Artists.

2. The defendants have violated Section 1 and Section 2 of the Sherman Act in that they have maintained an unlawful combination among themselves by means of which they have unreasonably restrained trade and commerce among [fol. 4925] the several states and have monopolized the business of operating theatres and the supplying of major films in various towns and cities, and that each of the major distributors by the methods it has employed in its dealings with the defendants and their independent theatre opposition has aided and abetted these defendants in such restraint of trade and monopolization of theatre operations. (p. 12.)

3. The defendants have maintained an unlawful combination among themselves and with their affiliated corporations and have monopolized the licensing of the exhibition of motion picture films in various cities and towns in violation of the aforesaid sections of the Sherman Act and, through the unlawful combination between themselves and their affiliates by their predatory practices, have monopolized the business of operating motion picture theatres in various towns and have attempted to monopolize in various other towns; and the defendants have contracted, conspired and combined with each other and their affiliated corporations and with each of the aforesaid major film corporations for the purpose, and with the effect of suppressing competition and monopolizing exhibition of films distributed by each of said film corporations in various towns and cities, in violation of the aforesaid statute. (p. 29-30.)

4. The principal means and methods employed by the defendant corporations through their officers and authorized representatives to obtain said monopolistic control of theatre operations are as follows:

(a) Arbitrarily depriving independents of first and second run pictures;

(b) Securing unreasonable clearances for the defendants' theatres over independent theatres;

(c) Making threats to build or open or close theatres to prevent construction or operation by independents;

[fol. 4926] (d) Lowering admission prices;

(e) Obtaining rental concessions;

(f) Restricting independents who sold to them as to periods and places of theatre operation, and

(g) Making long time franchise agreements covering the "Circuit." (p. 13.)

5. The plaintiff is entitled to a judgment enjoining the defendants:

(a) From monopolizing the supply of major first run films in any situation where there is a competing theatre suitable for first run exhibition thereof, and from monopolizing the supply of second run films in any situation where there is a suitable theatre for second run exhibitions thereof;

(b) From demanding or receiving clearance over theatres operated by others which unreasonably restrict their ability to compete with a theatre owned or operated by a defendant, or corporations controlled by it;

(c) From conditioning the licensing of films in any competitive situation, outside of Buffalo, New York, upon the licensing of films in any other situation;

(d) From selling or acquiring any theatre interests pending the further order of this Court;

(e) From enforcing any existing agreements heretofore entered into by the defendants not to compete, or to restrict the use of any real estate to non-theatrical purposes; from the use of any threats or deception as a means whereby a competitor is induced to sell;

(f) From continuing the heretofore described "conspiracy" or "monopolization" in restraint of trade and commerce between the states and the entering into any combination or conspiracy for the purpose or with the effect of restraining trade and commerce between the states;

[fol. 4927] (g) And directing the entering of a decree adjudging that the defendants and their affiliated corporations be dissolved, re-aligned or reorganized in their ownership and control, so that fair competition between them and other theatres be restored and hereafter maintained; and that the determination of the question of the dissolution, re-alignment or reorganiza-

tion of the parties aforesaid and the method to be employed in the accomplishment of the same to be left to be fixed by this Court after further consideration with the parties. (p. 30-31.)

John Knight, U. S. D. J.

Feb. 31, 1945
at Buffalo, N. Y.

[fol. 4928] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

Civil No. 223

UNITED STATES OF AMERICA, Plaintiff,

vs.

SCHINE CHAIN THEATRES, INC., et al., Defendants

JUDGMENT—October 31, 1945

This cause having come on for hearing before this Court upon the pleadings and upon the testimony, both oral and documentary, introduced at the trial of this cause, and the same having been argued by counsel upon briefs submitted, and the Court having rendered its opinion herein on October 8, 1945 and herewith filed its findings of fact and conclusions of law wherein the defendants herein have been found to violate Sections 1 and 2 of the Sherman Act:

It is hereby ordered, adjudged and decreed as follows:

I

1. The defendants have maintained an unlawful combination among themselves and with their affiliated corporations and have monopolized the licensing of the exhibition of motion picture films in various cities and towns in violation of Sections 1 and 2 of the Sherman Act and, through the unlawful combination between themselves and their affiliates by their predatory practices, have monopolized the business of operating motion picture theatres in various towns and have attempted to monopolize in various other towns; and the defendants have contracted, conspired and combined with each other and their affiliated corpora-
[fol. 4929] tions and with each of the aforesaid major film

corporations for the purpose, and with the effect of suppressing competition and monopolizing exhibition of films distributed by each of said film corporations in various towns and cities, in violation of the aforesaid statute.

II

Each of the defendants is hereby enjoined and restrained:

1. From monopolizing the supply of major first run films in any situation where there is a competing theatre suitable for first run exhibition thereof and from monopolizing the supply of second run films in any situation where there is a suitable theatre for second run exhibition thereof.

2. From demanding or receiving clearance over theatres operated by others which unreasonably restricts their ability to compete with a theatre owned or operated by a defendant or corporation controlled by it.

3. From conditioning the licensing of films in any competitive situation outside of Buffalo, New York, upon the licensing of films in any other situation.

4. From selling or acquiring any theatre interest pending the further order of this Court.

5. From enforcing any existing agreements heretofore entered into (1) not to compete or (2) to restrict the use of any real estate to non-theatrical purposes.

6. From using any threats or deception as a means whereby a competitor is induced to sell.

7. From continuing any contract, conspiracy or combination with each other or with any other person which has the purpose or effect of maintaining the exhibition or [fol. 4930] theatre monopolies of the defendants or of preventing any other theatre or exhibitor from competing with the defendants or any of them, and from entering into any similar contract, conspiracy, or combination for the purpose or with the effect of restraining or monopolizing trade and commerce between the States.

III

The defendants and their affiliated corporations be dissolved, realigned, or reorganized in their ownership and control so that fair competition between them and other

theatres may be restored and thereafter maintained. The plaintiff and the defendants shall each within 60 days from the entry hereof submit a plan to this Court for such dissolution, realignment or reorganization as they believe will attain this end and serve copies thereof upon opposing counsel. Within 30 days after the service of such a plan upon counsel for the parties they shall advise the Court in writing of their objections, if any, to such plans and such counter or substitute proposals for the carrying out of this provision of this judgment as they may desire to submit.

IV

Jurisdiction of this cause is retained for the purpose of entering such further orders as may be necessary to amend, construe, and carry out this judgment after such hearings thereon as the Court may direct.

Enter,

John Knight, U. S. District Judge.

Dated the 31 day of October, 1945.

[fol. 4931] IN UNITED STATES DISTRICT COURT

[Title omitted]

DEFENDANTS' MOTION PURSUANT TO RULE 52(b) OF THE RULES OF CIVIL PROCEDURE, TO AMEND THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW, TO MAKE ADDITIONAL FINDINGS AND CONCLUSIONS OF LAW, AND TO AMEND THE JUDGMENT ACCORDINGLY.

The defendants move the Court to amend its findings of fact and conclusions of law, dated October 31, 1945 and entered herein November 1, 1945, in the particulars hereinafter set forth, and to amend the judgment herein, dated October 31, 1945 and entered November 1, 1945 accordingly all pursuant to the provisions of Rule 52 (b) of the Rules of Civil Procedure.

The defendants do not by this motion, or by any submission or request for findings on the evidence and exhibits now in the case, waive any objection to the admissibility of any evidence or exhibit which has been admitted over the objection of the defendants and the inclusion in the findings

of any statement based on that evidence or on that exhibit. Nor do they waive or withdraw any request for findings heretofore made by them.

With the aforesaid reservations, each defendant in this case separately moves the Court that the findings of fact and conclusions of law heretofore filed and entered herein be amended in each of the respects hereinafter set forth. Each defendant makes this motion with respect to each paragraph separately. In accordance with the foregoing, each defendant moves the Court to amend its findings and conclusions in the following particulars:

I. Striking Out the Following Numbered Findings of Fact and Making the Following in Lieu Thereof*

1. In place of finding of fact No. 3, substitute the following finding:

[fol. 4932] "Since 1931 there have been 118 theatre corporations which have been incorporated or in which an interest has been acquired by Schine. Among the theatres in which Schine became financially interested there are 25 theatres situated respectively in 16 towns, Auburn, Bath, Canandaigua, Carthage, Corning, Gloversville, Herkimer, Little Falls, Newark, Norwich, Oneonta, Oswego, Salamanca, Saranac Lake, Syracuse and Watertown, New York, which had belonged to Schine before 1930 and had been leased to the Fox-Metropolitan Circuit in 1929, and which reverted to Schine in 1933 as a consequence of the termination of the leases in the Fox-Metropolitan bankruptcy proceedings. The result of this reversion was that it was necessary for Schine to resume the operation of the said theatres. At the end of the year 1930 Schine had no motion picture theatres, except suburban theatres in Buffalo and Rochester, motion picture theatres in Courtland, East Rochester, Fairport, Rockport, Geneva, Malone, Medina and Ogdensburg, and a half

* The defendants have not as yet received copies of the findings of fact and conclusions of law as actually filed. Numerical references to findings of fact heretofore filed are therefore made to the numerical designations of the findings of fact proposed by the plaintiff, which the defendants understand were signed by the Court as proposed.

interest in Amsterdam, and a theatre under construction in Bellefontaine, Ohio. As of the time of the commencement of this suit there were 62 of such operating corporations, and in 48 of these Schine owned 100% of the stock, in 12, 50%. Schine operates 93 theatres in 73 towns (including cities). The towns ran generally in population from 5,000 to 35,000 and include 39 in New York, 16 in Ohio, 8 in Kentucky, 7 in Maryland, 2 in Delaware, and 1 in Virginia. There are upwards of 1,350 motion picture theatres in New York state, upwards of 800 theatres in Ohio, upwards of 200 theatres in Kentucky, upwards of 200 theatres in Maryland, upwards of 270 theatres in Virginia, and upwards of 30 theatres in Delaware. In addition to its theatrical and realty operations Schine has booked and bought for and supervised 37 theatres since 1931, and when this suit was brought there were 27 for which it so acted. At the date of the commencement of this action Schine operated motion picture theatres in 59 towns in which Schine owned the only motion picture theatres operating in such towns. In most of these towns, all of the theatres had been operated by a single owner, and was so operated at the time of the acquisition of the same by Schine. In the other 17 towns there were theatres operated by other than Schine. Since 1928, including the 25 theatres reverting from Fox-Metropolitan, the number of theatres in towns in which there was no opposition theatre increased by 56. In most of these no theatre, or not more than one theatre, had operated before Schine began operating there. Schine built, bought or received a lease of its first run theatre in each of the above mentioned 73 towns in the ordinary course of the expansion of its business.

2. In place of finding of fact No. 4, substitute the following finding:

"Schine has expended for the cost of land and buildings acquired by it the sum of $6,509,100.00 and for the cost of building additions and improvements the sum of $4,439,000.00. These expenditures were made in the normal course of the developments of Schine's business for the purpose of conducting the exhibition business locally in the respective cities and towns so attractively

[fol. 4933] to patrons as to make the business profitable, and not for the purpose of acquiring any monopoly or restraining interstate trade or commerce or for the purpose of driving any other person out of the exhibition business."

3. In place of finding of fact No. 5, substitute the following finding:

"There are eight so-called major film companies, Fox, Loew, Paramount, RKO, Warner, Columbia, Universal and United Artists, which supply Schine a large percentage of the feature film used by Schine and together received upwards of 75% of the total film rental paid by Schine. Other major distributors not classified with the eight are Monogram and Republic. The principal sales office of each distributor is in New York City, and the method of licenses and servicing of films is substantially similar with each. The feature films are mostly produced in California, where the negatives are made, the positive prints being generally manufactured in California, New York or New Jersey. Film license applications are solicited by salesmen from the branch office and the delivery and return of films are made through the branch. All contracts are subject to approval by the main office at New York. Prior to the 1941-1942 season it was the usual custom for all of the distributors to make license agreements for feature films for a period of a year, commencing about September of each year, which license agreements were ordinarily made before the film was produced. Since that season the films of Fox, Loew, Paramount, RKO and Warner have been licensed, after production, in blocks, generally not exceeding five in number, rather than in season blocks."

4. In place of finding of fact No. 6, substitute the following finding:

"One or more of the individual defendants held one or more of the principal offices in the defendant corporations and other offices in the various so-called local corporations. None of the individual defendants own any stock in any of the corporate defendants, nor have they owned any stock since August 31, 1931, except that John May owned 1331 shares of the Class A

common stock of Schine Chain Theatres, Inc., which stock he disposed of on February 19, 1932, and except that J. Myer Schine, Louis W. Schine and John A. May owned from time to time various shares of the preference stock of Schine Chain Theatres, Inc., (a non-voting stock, except in certain contingencies provided for in the certificate of incorporation). The preference stock was retired by the corporation on March 1, 1944. The duties and authority of Lazaar, Silverman, Hensler and Insley were in each instance, subject to the supervision and direction of the executive office at Gloversville. Negotiations for the licensing of motion pictures was generally carried on in the first instance by Lynch. He negotiated generally with the respective distributors through their respective division managers in New York. Any proposed contracts resulting from such negotiations were subject in every instance to approval on the part of the distributors by their duly authorized representatives (generally the general sales [fol. 4934] manager), and on the part of Schine by Lynch's superiors.

Occasionally agreements between Schine and the respective distributors took the form of what is known in the industry as a "master agreement" supplemented by "deal sheets," but this was by no means the invariable practice."

5. In place of finding of fact No. 7, substitute the following finding:

"The Circuit had the normal influence of a very large buyer with each of the distributors. This improved the opportunity of the Circuit to make more favorable terms than a small customer. The extent of this film buying is demonstrated by the large number of theatres controlled by Schine and the large amount of money which had been paid and was to be paid for film rentals. This buying power included both towns in which there was no opposition exhibitor, called "closed" towns, and those in which there was an opposition buyer, sometimes called "open" towns. The negotiations for film for the different theatres were conducted sometimes separately and sometimes involving more than one town. Sometimes the contracts were made separately and sometimes a "master agreement"

with deal sheets was made for a number of towns, some open and some closed. The fact that Schine was buying product for theatres not owned or operated by it increased the value of his patronage and also increased the prospect of getting contracts favorable to the theatres for which Schine was buying. Schine acquired by purchase or lease 55 theatres from 1922 to 1931 and 80 from 1936 to 1941, inclusive, 15 in 1938 and 15 in 1939. The 55 theatres included the 25 which, as above stated, had been acquired by Schine and sold or leased to Fox-Metropolitan and which reverted to Schine in 1933 in the Fox-Metropolitan bankruptcy proceedings."

6. In place of finding of fact No. 8, substitute the following finding:

"The means and method employed by the Schine Circuit in carrying on its business were numerous. The Circuit required so many pictures for its theatres that its purchases frequently left no first run, and sometimes no second run, pictures for other theatres in the same town. Schine sought to obtain clearances in the competitive areas against subsequent runs and obtained them to the extent hereinafter set out. These clearances provided that subsequent runs of the pictures could not be shown in the areas described until after the number of days stated in the clearance terms." (See also Proposed Amendments 27-30.)

"Schine made agreements with some of the distributors for the supply of product for a period of more than one year, as hereinafter set forth. Such agreements are described herein as "franchises." Schine made these franchise agreements so as to get a definite assurance of the product for the times stated in them. The respective distributors who entered into the agreements made them for the purpose of having an assured output for the places stated and for the times stated." (See also Proposed Amendment 67.)

[fol. 4935] 7. In place of finding of fact No. 9, substitute the following finding:

"Whenever Schine built, bought, leased or otherwise acquired a theatre or theatres in any town, the Circuit

endeavored to license the film necessary to operate the theatres, generally Schine was able to obtain such pictures because of its reputation as a good customer. Whatever film was licensed by Schine for any specified run could not be licensed for the same run to any other exhibitor."

8. In place of finding of fact No. 10, and findings 11 (b), 11 (f), substitute the following finding:

(a) "In 1937 Schine took up for consideration the possibility of building an additional theatre in Canandaigua when there was prospect of the construction of a large veterans' hospital that would bring several hundred families into town. The planning and finishing of the theatre took about two years. During this period a sign was put up. By whom does not appear. The sign bore no signature, either written or printed. It was erected on a lot occupied by Montgomery Ward & Co., called the Flanagan lot. It said something about a new theatre to be erected by Schine or the Schine organization, or some such thing like that. The newspaper in Canandaigua published an article that the Schine Circuit was going to build a new theatre. The new theatre was built, not on the lot occupied by Montgomery Ward & Co., but on another lot, for which Schine paid $15,000 for the land and structure on it and paid in addition for building the Lake theatre, $38,500. This new theatre, the Lake, was a theatre of 400 or 450 seats, of fine construction, equipment and decoration."

(b) "In Paris, Ky., in October 1937, Schine received a license, pursuant to the city ordinances to erect and operate a new theatre. Schine proceeded to have plans drawn and got bids in the spring or summer of 1938 and completed the new theatre in 1939. In November 1938 Harry Schwartz, about four months after he knew of the proposal for the new Schine theatre, obtained a lease of property in Paris. Lazar asked Schwartz if he had not seen the sign on the lot Schine had purchased some time ago and that they were going to build a new theatre on it, and Schwartz told Lazar that he had. Lazar said they had every intention of building a theatre in Paris and were not decided on just what type

or what size, and that is why they had not begun earlier, and that he felt that Schwartz was making a mistake in building in competition with them, and Schwartz told him that he did not think so or he would not have signed a 20-year lease on the main corner of the town, and that he felt that he had the best location in Paris and that he felt the theatre would be self-supporting. Lazar asked him if he would not go to meet him at the Lafayette Hotel, and Schwartz said that he would be glad to do so and went later in the day to the Lafayette Hotel. Lazar said that he did not feel that Paris could support three theatres and that as long as they had been in Paris operating a theatre and had anticipated building a new larger theatre, he could not quite understand what would prompt Schwartz to go into the town as [fol. 4936] competition. Schwartz repeated that his location was the better of the two and that he was not afraid of the competition. Lazar asked him to think things over, that he felt that Schwartz was making a great mistake and would lose plenty of money, and that if Schwartz cared to, he would take this lease off his hands. Schwartz said for how much, and Lazar said, are you trying to hold me up, and Schwartz said I am not trying to hold you up; you called me up and I did not come to see you or call you up. Lazar said well, I believe that Mr. Schine would be willing to take this lease off your hands and relieve you of that obligation, and Schwartz said that he did not intend to give up the lease and that he was going ahead with the theatre, and that ended the conversation. After Schwartz began construction, Lazar called Schwartz on the telephone and asked him whether he was still determined to build or whether he was just starting operations to stop within a week or so, and Schwartz told him that he intended to go ahead, had plans drawn by a theatre architect and a contract had been signed with the construction company to build the theatre, and he fully intended to build it. Lazar told him that his offer was still good, and Schwartz told him that he did not believe he would care to sell the theatre or assign the lease. Three weeks later, after the side walls were already constructed, Lazar called Schwartz on the telephone and asked Schwartz to stop construction and see him about a deal. Schwartz saw Lazar at the

Lafayette Hotel. There they went over the same discussion and Lazar said he was willing to enter into a deal for the Opera House property in Lexington, Schwartz' Paris theatre and a theatre that Schwartz was operating in Frankfort, Ky. At this time Schine was building in Paris, and they made a deal and Schwartz stopped construction about August 30, 1939. The agreements are dated September 15, 1939. They contain a provision that the assignors will not be interested for fifteen years in the motion picture, theatrical or amusement business in any city or town in the State of Kentucky, in which the assignee or any of its affiliated or associated companies are now engaged, except that the assignor may invest in stock and securities listed on any recognized stock exchange, and that Schine pay to the assignor $5,000 for the Paris leases and assume liabilities, and that Schine pay to the lessor $22,500, for the Opera House lease. Paris was not big enough for more than two theatres. Schwartz in his dealings with the Schine interest was met only with courtesy and fair discussion of negotiations. The two agreements were a good deal for Schwartz and he got not only the money consideration, but a new lease of the Opera House running to Schwartz, as lessor at a fair and satisfactory rental. At the time of the agreements the only Kentucky towns that Schine was in were Middlesboro, Corbin, Pikeville, Paris, Richmond, Lexington and Maysville. The Paris theatre is a very fine theatre."

(c) "In Perry in July 1935, Schine bought the Davis property a little below the Hotel, at a corner on the Main Street. Thereafter Mr. May called on John C. Herzberger, the operator of the Auditorium theatre, and introduced himself and said that he had just closed a deal with Porter Davis, buying a lot for Schine, on [fol. 4937] which they were to build a theatre seating 1,000 persons and costing about $100,000, and that he hoped that they would be friends. In August 1935 Herzberger met Myer Schine at the Seneca Hotel in Rochester and Schine offered Herzberger $5,000 for his lease from the Town of Perry of the Auditorium. An agreement was signed subject to the approval of the Town Board to the sale of the lease, and to expire

on September 1. In August 1935 the Town Board wanted Herzberger to stay and would not let him sell the lease. Schine received the blue prints for a new theatre in Perry, dated September 1935, and specifications therefor, and the time fixed for receiving bids for construction was October 4, 1935. In September or October 1935, Mr. Osborne of Dipson & Osborne came to Mr. Herzberger several times about taking over his lease, and for more money than Schine had offered, and Herzberger made a deal with them and continued to manage the theatre for a year. Dipson improved the theatre at a substantial expense of about $13,000 and made the theatre a satisfactory theatre and removed any occasion for having another theatre built in the town. Before this improvement the theatre was not at all a modern theatre but had been built in 1898 for stage performances. After rebuilding it had about 700 seats, as Dipson reseated the theatre. Dipson & Osborne later sold this lease to Schine and Schine made additional improvements to the theatre at a cost of $7,500. No other theatre has been built in Perry."

(d) "In Salamanca, in October 1924, Schine became the lessee of the Andrews theatre, 735 seats, and in 1927 bought the land on which the new theatre was subsequently built. The original cost of the land was $24,300, to which Schine added a building and improvements at an additional cost of $164,300. Under an agreement with Fox-Metropolitan, Schine undertook to construct a new theatre on its land in Salamanca and to lease it to Fox-Metropolitan. This agreement was terminated and the theatre was not then erected. Schine took the new building project up with the architects in mid-summer of 1938 and sent blue prints of the land to the architect on August 23, 1938. The plan to complete the theatre in 1939 was held up by lack of materials, which could not be obtained, and the completion and opening was in August 1942. The new theatre is a very lovely theatre, air conditioned, with modern equipment, with about 1200 seats. In December 1938, C. R. Dickerson, manager of the Schine theatre in Salamanca, came into the office of the publisher of the newspaper, Salamanca Republican Press, and told him that the Schine company would build a new

theatre in Salamanca and that the architect was at work on the plans, calling for completion in the following May. The publisher wrote and published an article to this effect in the Salamanca Republican Press on December 24, 1938."

(e) "In Medina, Ohio, Yudelvitz and Willis were lessees and operators of the Princess theatre as a first run theatre, with all the first run product they wanted. By January 1, 1937 they had learned that Fine and Essick, with a circuit of some 29 theatres, an independent circuit, that is, not connected with any producing company, were proposing to come into Medina in opposition to them. Thereupon Yudelvitz and Willis negotiated with Schine and on March 18, 1937 entered into [fol. 4938] an agreement with Schine to come with them and to build a new theatre. At almost the same time the Masonic Lodge of Medina entered into the reconstruction of their building with a theatre in it. In March 1937 they wrote to Schine asking him not to go ahead with the plan to build a new theatre in Medina. In September 1937, through negotiations with Yudelvitz and associates, Schine became interested in 50% of the lease of the Princess theatre, which Yudelvitz and Willis were operating. After the reconstruction of the Masonic Temple building, the new Temple theatre alone was ample for the town, but the Princess was not. Before the new theatre, the Temple, opened Yudelvitz was playing Metro, Paramount, Fox, RKO and Republic pictures (the last named because with the Western stars, Ken Maynard and Gene Autry, he wanted to play Republic on Fridays and Saturdays, although he was not forced to do so from any lack of product). The Princess continued to have the first run product required for the operation of that theatre. Essick and Fine could not buy the same product which had already been sold to the Princess for the same run. In April 1939 after extended "cross the table" negotiations the Schine and Yudelvitz interests became interested in 50% of the lease of the Temple theatre, the other 50% being retained by Essick and Fine, who also acquired a 50% interest in the lease of the Princess, so that in April 1939 and thereafter the interest in the two leases stood, Yudelvitz 25%,

Schine 25%, Essick and Fine 50%. Schine said nothing to Essick and Fine by way of threat. In the operation of the Medina Temple theatre the town has been very well served and the worth while pictures of all the distributors from time to time have been exhibited there."

(f) "In Mt. Vernon, Ohio, Mr. Smoots, the owner of the Vine theatre and lessee of the Memorial theatre, brought the matter of going into Mt. Vernon to Schine's attention and proposed to lease the Vine to Schine and to assign his lease on the Memorial, which was then closed. At about the same time Mr. Platt, who operated the Lyric, said that he would like to sell Schine the equipment and lease of the Lyric provided he could get a job to manage the theatres in town, and this deal was closed about February 1934. Schine became the lessee of the Vine theatre and of the Memorial theatre in January 1934, and of the Lyric theatre in February 1934, and of the Memorial again at the end of December 1940. The Lyric location was the finest location in town. In April 1938, on the Lyric site and on additional land bought, Schine built the new Vernon theatre. The new Vernon theatre is a modern fireproof constructed theatre with a wide marquee in front, no stores, a large lobby, and in the interior decorated in very modernistic style, with the finest seats obtainable. It has all the other equipment and a fine mezzanine furnished attractive and comfortable, with fine public spaces upstairs and downstairs. The cost was from $120,000 to $130,000."

9. In place of finding of fact No. 11 (a), 11 (e), 11 (h) and 11 (i), substitute the following finding:

(a) "At Bellefontaine, Ohio, in 1930 a delegation from Bellefontaine called on Mr. Schine with reference to the establishment of a new theatre in Bellefontaine. [fol. 4939] At this time the Schine Circuit was operating in only eleven cities and towns. These were all in New York State. As a result of the call of this delegation Schine acquired land in Bellefontaine in 1930 and built the new Holland theatre, which was opened on February 12, 1931. It was of the latest type of first class moving picture theatre. At this time

Milton A. Mooney as a lessee was operating the Strand theatre. He operated the Majestic theatre during the annual fair week, and in the year 1928 to 1931 he closed it entirely. It was a small, old converted store show, without equipment for sound pictures. He also had the Opera House, an upstairs house, seventy-five years old, without sound equipment, and closed except for an occasional stage show. The Majestic and the Opera House were of no value, and the balance of the lease of the Strand and its equipment, which had been used for seven years, was all that Mooney had to sell. In May or June 1931, Mooney saw Mr. May, who offered $2500 for the lease, and Mooney sold the balance of the lease of the Strand and its equipment in July 1931. The lessor of the Strand was one Gutilla. It had been made in 1924, expiring in 1934. Gutilla then renewed the lease until 1938. This negotiation was with Mr. May or with Mr. Lazar. In these negotiations Mr. Lazar said that if the Strand lease was not renewed and Gutilla operated it, Schine was going to play second run at the Opera House, on which he had a lease. The Opera House had been closed from 1932 to 1934 and open from 1934 to 1936 as a second run house. From 1932 to 1934 it had been open about six or seven months. Gutilla had his final negotiations for the lease with Mr. Schine."

(b) "At Lockport, N. Y., Schine began to exhibit in 1922. He bought a large building which had been a skating rink and then used as a garage, and converted it into a modern large motion picture theatre, the Rialto theatre. It had great advantage over any other theatre in Lockport because of its downstairs seating capacity. It cost, for original purchase, $27,500, and for improvements $118,400. In October 1927 Schine became half owner in the lease of the Hi-Art and of the Palace theatre constructed several years after Schine had opened the new Rialto. The Rialto had been playing the best first class pictures and the Palace played vaudeville and pictures and part of the time pictures only. Later Schine discontinued vaudeville at the Palace and moved the best pictures into the Palace and played first and second run at the Rialto. Schine was forced out of the Palace theatre in December 1932.

Before this Schine had negotiated for contracts for the 1932-33 product sufficient to operate two theatres which Schine was then operating. The owner of the Palace thereupon opened the Palace. The Rialto was showing all the product of the eight companies except Metro. Schine, on losing the Palace, remodelled the Hi-Art, to be operated in place of the theatre that he had lost. Before reopening the Hi-Art, Mr. May made an offer for the Palace and stated that Schine was withholding opening the Hi-Art for an additional few days for him to decide whether or not he would accept the proposal, and that Schine would reopen the Hi-Art to play the product under contract. The owner of the Palace was unwilling to accept the offer. The Hi-Art, which had been closed during the seven years that the Palace was operated, was reopened."

[fol. 4940] (c) "At Rochester, N. Y., beginning in August 1925, Schine operated from time to time twelve theatres. One of these was the State. In 1927 Mr. Tishkoff and Mr. Schine had a conversation informally in the lobby of the Seneca Hotel. Schine asked him whether it was true that he and his associate proposed to build a theatre in the neighborhood of the State operated by Schine and Plaza operated by a- independent, and Tishkoff said that it was true. Schine asked him whether he thought the location was suitable for a third theatre, and Tishkoff said that he didn't know, that his partner got into it and he went along. Tishkoff said why don't you come up to my office tomorrow and I will have my associates there and see if we can't work out something whereby we might have a partnership in the theatres. The next day they met in Mr. Tishkoff's office and Schine told the group that the neighborhood was already overseated and that the Plaza had just been remodelled and that there wasn't room for a third theatre. They talked about the possibility of a partnership, and Schine said that he wouldn't go into the partnership, that they were overseating a neighborhood and that if they really wanted to build a theatre there were many other neighborhoods where a theatre was needed, but they said that they owned a lot and were going ahead, and Schine said that there would be no more sense in it than in building

a theatre near the Murray. Schine said that the Webster location was not appropriate, that it was too near the State. The State and the Webster were three-quarters of a mile apart. Schine later acquired the Webster."

(d) "At Seneca Falls, N. Y., Schine bought the Seneca theatre. A sign was then put on it, 'Closed for Alterations—Will Reopen Soon as a Schine Theatre.' An independent, who was without financial resources and was seeking to acquire the means to build a theatre, discontinued these efforts for two years. The sign reappeared on the Seneca. The Seneca did not reopen. The independent did not raise the money."

10. In place of finding of fact No. 12, substitute the following finding:

"In any town in which Schine bought motion picture product for a specified run, it was of course impossible for any other theatre to buy such product for the same run. This condition existed in Auburn, New York, Lockport, New York, Mount Vernon, Ohio, Paris, Kentucky and Bellefontaine, Ohio. In such instances the operator of the other theatre would buy a different run or from a different distributor."

11. In place of finding of fact No. 13, substitute the following findings:

"At Corbin, Medina and Lockport, Schine had the first run product. In Corbin, Schine was the licensee of this product before there was any other theatre in town. One of these theatres, the Hippodrome, was a much more substantially constructed and more expensive theatre than the new theatre that was built. The facts as to Medina and Lockport have been stated hereinbefore.

[fol. 4941] In Rochester, N. Y., Schine had the first run neighborhood product for the Riviera, State, Dixie and Liberty theatres. These included the best neighborhood houses in Rochester. The Fenyvessy theatres took clearance over all other Schine theatres in Rochester. Schine had these first neighborhood runs before the independents acquired their theatres."

12. In place of finding of fact No. 15, substitute the following finding:

"In certain cases when Schine purchased or acquired a lease of a motion picture theatre or theatres as going concerns, an agreement was made with the former operator which provided that such operator would operate the motion picture theatres within limited competitive areas for limited periods of time. In certain instances this non-competitive agreement covered nearby towns other than the towns in which the former operator had been in business."

13. In place of finding of fact No. 16, substitute the following finding:

"The franchise agreements hereinbefore described were voided as of May 19, 1942. It does not appear that in negotiating for product or franchises for product for the Schine Circuit there has been any departure from the normal and usual courses pursued in the industry for such negotiations to get the best prices and terms and runs and clearances obtainable for the Circuit by earnest and fair negotiations. As far as material the terms of the franchise agreements are set out herein. Franchise agreements were made by the respective distributors with independents. Franchise agreements gave the holder and the distributor the benefits stated therein. Conspicuously, they gave the holder the assurance of the product covered for more than one season, and they gave the distributor the assurance that that product was placed for more than one season. It was Schine's practice prior to 1936 to make contracts for a single year. He then began to make contracts for a period of two or three years. These contracts included the entire Circuit and those theatres for which Schine did the booking. The extent of Schine's business generally and his superior ability as an exhibitor made him the customer most to be desired by each distributor. In 1936 Schine made a three-year agreement with Fox for the feature product in all the Schine towns. This agreement was later made to include subsequently acquired theatres. In 1938 a subsequent three-year agreement was made. These agreements provided in the case of certain pic-

tures for payment of certain percentages of gross receipts as film rental, and also for fixed minimum admission charges. With Loew in 1936 a comparable four-year agreement was made. In 1937 a comparable three-year agreement was made with Warner. In 1938 a comparable one was made with RKO. A comparable one was made for Columbia for two years. A comparable agreement was made with Universal for three years in 1939. In the instance of United Artists, a distributing corporation, separate contracts were made for each feature for all Schine theatres. These agreements contained clearance provisions."

[fol. 4942] 14. In place of finding of fact No. 17, substitute the following finding:

"In certain instances clearances were allowed to Schine over towns in which Schine did not operate. Some towns were distant from ten to upwards of twenty miles. Gloversville got clearance of 45 days over Johnstown. Gloversville is three miles from Johnstown. Schine was given clearance over Newfane and Mohawk, where there were no theatres. Many of the clearances were over outside towns of small population, such as Randolph, Little Valley and Elliottville, New York. The competitive conditions existing in these towns, such as shopping centers and business centers, do not appear. In certain instances clearances have been given over towns where there had been no previous clearance. It does not appear what have been the changes in shopping and other relations between the towns. Metro gave clearance in Ashland over Londenville and Lodi, Ohio. United Artists gave clearance in Auburn over Skaneateles, New York. Fox gave clearance in Hornell over Earlville, New York. The interdepartment communications between employees of major film companies and some letters written by Schine employees are stated below. Among these are communications by Lehman of United Artists, Pielow of Metro, Dana and Sauber of Universal, Smith of Warner, Sussman and Grassgreen of Fox. These communications were admitted in evidence over the objection of the defendants, pursuant to a ruling that it was within the scope of their duties to make the representations in the communications, and that they did it as a

natural incident of the office, namely, a branch or district manager. None of these persons were called as witnesses by the plaintiff, and no attempt was made to qualify them as experts upon the subject of clearance, or to ascertain what factors they or any of them considered in determining whether any given clearance was reasonable or unreasonable. Pielow, M. G. M. resident manager, wrote: 'I feel that in some of the situations (unnamed) (discussing Schine contracts) the clearance that he (Lynch) is demanding is unfair . . .' Dana, branch manager of Universal, wrote the district manager that he had asked Louis Schine relative to clearances over the Smalley Circuit (Norwich), and that he refused to grant the privilege of serving the pictures with shorter clearance. Universal branch manager Sauber wrote Lynch that they wanted to serve Waterloo in less time than the 30 days clearance after Seneca Falls, because other majors were doing so, but Lynch refused. There was a writfen contract covering this. At Rochester, Scully of Universal said it would be satisfactory if the Madison and Monroe came within the Schine 21-day clearance. Smith, branch manager of Warner, wrote to the home office that Canton would do more business if it were not for Schine at Ogdenburg having 30 days clearance and if it was reduced: "It will make a better condition for us all . . ." Smith also wrote relative to Seneca Falls stating that he hoped Lynch would break down their 60-day clearance: "As I told you this morning over the phone, the clearance set up is all wet . . ." Sussman of Fox wrote to Grassgreen that the 60 days clearance in Glens Falls and elsewhere seemed excessive. Sussman went on to comment [fol. 4943] that he noted that 60 days clearance was given over second run at Malone when Fox had no second run in Malone, and furthermore, as previously stated, 60 days over second run seemed excessive. Grassgreen replied that while the 60 days at Glens Falls might seem excessive, Lynch insisted upon it. Grassgreen said that Schine insisted upon the 60 days clearance because they wanted to be consistent with their demand for 60 days over subsequent independent runs. In each competitive area, under normal business conditions of free competition, each distributor desires to

license its films for successive runs in such area and under such clearance terms as will yield the maximum total license revenue from the area. In determining which theatre shall have which runs, its past relations with the theatre, the skill and character of its management, its size, location, equipment, and drawing power are all features which among others may influence such decision. Motion pictures are works of art and are the subject of copyright. They have no uniform or market value and the revenue which the owner of a copyright can derive from any picture or group of pictures depends upon the ability of the distributor to market them in different situations to the best advantage. The distributor generally licenses the picture and determines the rental and clearance in accordance with the box office grossing ability of the picture at the theatre to which the distributor decides to license the picture. The effort of the distributor and of the exhibitor is to have the selection of the theatres to show at a particular time, so made that they will be spaced in areas so that the pictures are shown in the different theatres in such a way that a particular picture showing in one theatre will not draw directly away from another theatre playing the same picture that day. In determining the runs and the period and area of clearance the distributor figures that there is a certain amount of money that an individual of the public has to spend for motion picture entertainment during a given week, and that there is competition for that sum, because what is spent to see it in the first run house will leave so much less to be spent in the second run house, so that the first run house and the second run house playing later are in competition with each other or with any other theatre, and the distributor desires to have as much go into the first run house because the distributor can get more money out of that theatre than out of subsequent run theatres. Where there is only one theatre in a particular competitive area the principal competition to supply pictures to the theatre is among the ten larger companies, Columbia, Fox, Metro, Monogram, Paramount, Republic, RKO, United Artists, Universal and Warner, and of these Fox, Metro, Paramount, RKO and Warner are sometimes spoken of as the Big Five, producing the

larger number of pictures which are box office attractions in the cities, but the Western and action pictures in which Republic and Monogram have specialized, are most popular in the little towns of the South and West and more preferred on that account by exhibitors. Where there is more than one theatre that is a possibility for the distributor to sell, the distributor in selecting the customer to be obtained, if possible, takes into consideration the ability of the customer to gross, the operation of the theatre, the people conducting the business, the more substantial business man of the two, [fol. 4944] the theatre itself, in view of the distributor's desire to play its pictures in the nicest theatre with comfortable seats, a theatre showing a good clear picture on the screen, one that is well ventilated and well managed all the way through, with a desire to play the picture in the theatre charging the higher admission price, and there are other elements to be considered. In selecting a second run in a competitive area the distributor takes into consideration first a protection of the film rental that is expected to come out of the first run and then the distributor makes sure that the operation of the theatre and the playing of the picture there will not harm the possibility of that picture doing its full amount of business, the full amount of business it is capable of doing at the first run house, and the distributor also takes into consideration the condition of the house itself, the projection, sound, ventilation and location of the theatre, with an inclination toward a busy corner or a location where more people are closer to the theatre, rather than one that is around the corner and off the beaten path. Each distributor considers the clearance one of the most important things that the distributor has to sell. Each distributor considered the Schine Circuit terms to be very satisfactory terms and that the deals made with that Circuit were comparable with the deals made with anybody else. It is of advantage to the distributor to have the operator of the first run theatre also play the second run, to avoid any reduction of revenue brought about by conflicting showings in the same competitive area of the pictures of the particular distributor."

15. In place of finding of fact No. 20, substitute the following finding:

"In certain instances the distributors made contracts providing for film rental based upon a percentage of the gross receipts and in certain other instances, the rental was a flat rental. When a percentage picture was played, with a competitive device (bank nights, etc.) sometimes provision was made for the deduction from the gross receipts of the cost of such competitive device before computing the distributors rental. These provisions were also in contracts with independents."

16. In place of finding of fact No. 21 substitute the following finding:

"In Lockport and Corning Schine bought some product second run and during the currency of the Schine contracts this run did not remain open for sale to others."

17. In place of finding of fact No. 22 substitute the following finding:

"In Lexington and Corning some film contracts with Schine did not contain a provision for the minimum admission price. At the same time the contracts with the independent for a subsequent run contained a provision for the minimum admission price. Experience had shown that Schine's policy of operation would lead him to set admission prices at what might be expected to bring the best return."

[fol. 4945] 18. In place of finding of fact No. 27, substitute the following finding:

"The facts appearing in evidence, as far as material to show the influence of Schine with the distributors and in cooperation on the part of any distributor have been stated above."

19. In place of finding of fact No. 28, substitute the following finding:

"As compared with some of the major distributors, the Schine Circuit is relatively small. Some of the major companies are exhibitors as well as distributors."

II. Making the Following Additional Findings of Fact.

20. All findings made herein with respect to any acts committed by the defendants or any of them or any course of conduct pursued by them which the Court holds to be in violation of the Anti-Trust laws are limited to acts committed or course of conduct pursued prior to May, 19, 1942, plaintiff's counsel having stated at the opening of the trial that he would not offer any evidence beyond that date.

21. There is no evidence that J. Myer Schine, acting as an individual, committed any act or pursued any course of conduct in violation of the Anti-Trust laws.

22. There is no evidence that Louis W. Schine, acting as an individual, committed any act or pursued any course of conduct in violation of the Anti-Trust laws.

23. There is no evidence that John A. May, acting as an invdividual, committed any act or pursued any course of conduct in violation of the Anti-Trust laws.

24. J. Myer Schine acted in connection with any matter involved in the issues in this case, as an officer, director or agent of the corporate defendant Schine Chain Theatres, Inc.

25. Louis W. Schine acted if at all in connection with any matter involved in the issues in this case, as an officer, director or agent of the corporate defendant Schine Chain Theatres, Inc.

26. John A. May acted in connection with any matter involved in the issues in this case, as an officer, director or agent of the corporate defendant Schine Chain Theatres, Inc.

27. For the past 15 to 20 years the normal method of licensing the exhibition of copyrighted motion picture photoplays in the United States of America, including the states of New York, Ohio, Kentucky, Maryland, Delaware and [fol. 4946] Virginia, has been on a so-called run basis, to wit:—For a first run to a theatre in a local competitive area with such exclusive exhibition rights and clearance privileges, if any, as may be appropriate to the successful exploitation of said copyrights in said area; for such subsequent runs in said area, and with such exclusive rights and

privileges, if any, as may be appropriate to the successful exploitation of said copyrights in said area (Plaintiff's Admissions 4615).

28. It has been the usual and customary practice for the distributor to agree with its licensees that it will not exhibit or grant a license to exhibit its photoplays for exhibition in conflict with the run licensed the exhibitor, or prior to the clearance period agreed upon with the exhibitor (Pltf.'s Adm. 4616).

29. The motion picture industry has developed under the existence of clearance and runs. It is by such a system with initially large receipts from prior run exhibitions and successive reduction of license charges that satisfactory revenue can be derived by the producers and distributors so that costly feature pictures can be made available to the whole public at varying admission prices (Pltf.'s Adm. 4616).

30. In each competitive area under normal business conditions of free competition each distributor desires to license its films for successive runs in such area under such clearance terms as will yield the maximum total license revenue from the area. In determining which theatre shall have which runs its past business relations with the theatre, the skill and character of its management, its size, location, equipment and drawing power are all features which among others may influence such decision (Pltf.'s Adm. 4617).

31. Motion pictures are works of art and are the subject of copyright. They have no uniform or market value and the revenue which an owner of a copyright can derive from any picture or group of pictures depends upon the ability of the distributor to market them in different situations to the best advantage (Pltf.'s Adm. No. 23, 4618).

32. Of the Schine theatres approximately 80% are located in cities or villages with populations under 25,000 and 60% are located in cities or villages with populations under 10,000 (Pltf.'s Adm. No. 11, 4617).

33. In a competitive area, where there are opposing possible theatres, to which films may be licensed, the distributor generally licenses the picture and determines the rental in accordance with the box office grossing ability of the picture at the theatre to which the distributor decides to license the picture (T. 4334).

[fol. 4947] 34. The cost of the original production of a picture to the point where the negative is ready, so that positives for showing can be made, at times runs into millions of dollars. Each positive taken from the negative costs approximately $185 or more in addition, and if it is in technicolor the cost of the positive runs much higher (T. 4335, 4337).

35. For the average picture Fox makes about 300 positive prints of an "A" picture and on an especially good picture as high as 360-370 such prints (T. 4337).

36. There are in operation in the United States, equipped for sound, in excess of 17,000 theatres (T. 4336).

37. A very good picture distributed by Fox would play approximately 14,000 of those theatres (T. 4341).

38. A single print would be called upon to serve from 40 to 50 theatres (T. 4341).

39. An ordinary tour of a print, from the time it leaves the exchange to go to one theatre, through transportation time, time of exhibition at the theatre, transportation time on return of the print, and inspection requires several days before the print can start out for its next theatre (T. 4341).

40. Fox serves that print over about a year of time to cover all the theatres in which that particular print is exhibited (T. 4342).

41. Fox has 31 exchange centers, each serving an area in which from 450 to 500 theatres on an average are located (T. 4343).

42. The prints are served in a sequence of time, starting generally to play first the larger theatres in the larger cities and towns, because those are the theatres that do the biggest business and the distributor regards them as a show window for the entire exchange territory, and in that show window the picture is well advertised, in the newspapers and sometimes in radio programs and in lobby displays and in front of the theatre (T. 4343).

43. The effort of the distributor and of the exhibitor is to have the selection of the theatres to show at a particular time, so made that they will be spaced in areas so that the pictures are shown in the different theatres in such a way that a particular picture showing in one theatre will not

draw directly away from another theatre playing the same picture that day (T. 4344).

44. In determining the runs and the period and area of clearance the distributor figures that there is a certain [fol. 4948] amount of money that an individual of the public has to spend for motion picture entertainment during a given week, and that there is competition for that sum because what is spent to see it in the first run house will leave so much less to be spent in the second run house, so that the first run house and the second run house playing later are in competition with each other or with any other theatre, and the distributor desires to have as much go into the first run house because the distributor can get more money out of that theatre than out of subsequent run theatres (T. 4344).

45. It is estimated that of the total revenue of a distributor 70% comes from the first run theatres and 30% from all other theatres playing second and subsequent runs, and that the 70% or 75% is made up of 35% or 40% from towns under 50,000 population and the other 40% or 35% from those over 50,000 population (T. 4345, 4608).

46. The plan of clearance came into the industry as a means of protecting the prior run theatre whose capital cost is very large, running in a medium sized town in the early days from $75,000 to $100,000 up to an investment of a million dollars or more in later days, which needed the protection for the investment by playing the first run of the picture a sufficient length of time before a second run in the same competitive area, so that the expectation that the picture might be seen in the same competitive area too soon would not detract from the attendance at the first run theatre and the consequent box office receipts there (T. 4479, 4346).

47. In determining the film rental, whether a percentage rental or a flat rental, the distributors aim at 35% of the gross box office receipts as the index in pricing (T. 4347-50, 4482, 4483, 4317, 4319).

48. It is the custom of the industry, if the box office receipts fall below the expectation on which the flat rental was based, to make subsequently a reduction in that rental to the point where the exhibitor can at least break even or show a small profit (T. 4347).

49. In determining the rental in the first place the distributor endeavors to estimate how much money the theatre could gross on the particular picture (T. 4348).

50. In the normally successful downtown city theatre, with a seating capacity of 1600, conducting a matinee and two successive evening performances, it is estimated that in the course of the three performances there will be in the aggregate 1600 admissions, so that if the average admission price was 25 cents, the gross to be expected would be $400 a day, or for a 4-day showing $1600 (T. 4350).

[fol. 4949] 51. At 35% of this estimate the asking price would be something like $550 for a flat rental for the picture (T. 4350).

52. It is customary to allow a deduction for the cost of a second feature if the theatre is showing double features, and for the cost of outside attractions at the theatre while showing the picture before applying the 35% (T. 4352).

53. The effort of the distributor is to get the percentage of gross receipts at a second or subsequent run theatre in the same way as at a first run theatre (T. 4374).

54. Where there is only one theatre in a particular competitive area, the principal competition to supply pictures to that theatre is among the ten larger companies—Columbia, Fox, Metro, Monogram, Paramount, Republic, RKO, United Artists, Universal and Warners—and of these, Fox, Metro, Paramount RKO and Warner are sometimes spoken of as the Big Five, producing the larger number of pictures which are box office attractions in the cities, but the Western and action pictures, in which Republic and Monogram have specialized, are most popular in the little towns of the South and West and more preferred on that account by exhibitors (T. 4478, 4375).

55. Where there is more than one theatre that is a possibility for the distributor to sell, the distributor in selecting the customer to be obtained, if possible, takes into consideration the ability of the customer to gross, the operation of the theatre, the people conducting the business, the more substantial business man of the two, the theatre itself, in view of the distributor's desire to play its pictures in the nicest theatre with comfortable seats, a theatre showing a good clear picture on the screen, one that is well ventilated

and well managed all the way through, with a desire to play the picture in the theatre charging the higher admission price, and there are other elements to be considered (T. 4476, 4376, 4556, 4605).

56. In selecting a second run in a competitive area the distributor takes into consideration first a protection of the film rental that is expected to come out of the first run and then the distributor makes sure that the operation of the theatre and the playing of the picture there will not harm the possibility of that picture doing its full amount of business, the full amount of business it is capable of doing at the first run house, and the distributor also takes into consideration the condition of the house itself, the projection, sound, ventilation and location of the theatre, with an inclination toward a busy corner or a location where more people are closer to the theatre; rather than one that is around the corner and off the beaten path (T. 4377).

[fol. 4950] 57. At times a picture after playing a first run in a theatre will be moved over to another theatre operated in common interest with the first, and this is ordinarily done without any interval of time between the end of the showing in the one theatre and its opening up in the other, and this is called a move-over run, which is treated as a part of the first run, as an entire run, and not as a second run (T. 4378, 4415).

58. The foregoing policies are in general the policies of each of the distributors (T. 4386, 4507-8, 4476, 4556, 4604).

59. Distributors consider that clearance is one of the most important things that they have to sell (T. 4397-98).

60. If a customer is a solid customer, who pays his bills and gives an honest count, and the distributor has been dealing with him over a long period of time, they don't get a guarantee from him on the percentage pictures (T. 4401).

61. The distributors considered the Schine Circuit terms to be very satisfactory terms and the deals made with that circuit were comparable with the deals made with anybody else (T. 4403, 4404).

62. In selling a group of pictures to the Schine Circuit there might be some pictures sold at 35%, some sold for lesser terms, and some on flat rental, dependent on the

quality of the picture in general and the distributor's ability to get the price (T. 4403).

63. The effort of the distributor is to get a price which is fair both to the distributor and to the exhibitor, and to take into consideration the effect on subsequent sales to him (T. 4405).

64. In fixing a price to one theatre consideration is not given to the price charged to another theatre, but to the expectation of the gross box office receipts of the particular theatre (T. 4413-14).

65. Size of theatre alone does not determine, as amount of playing time and ability to fill the house must also be considered (T. 4421).

66. It is to the advantage of the distributor to have the first run theatre also play the second run (T. 4487, 4554).

67. In issuing licenses for more than one season's product, which the plaintiff has described as a franchise, no distinction is made between large circuits and independent exhibitors operating only a few theatres, and more franchises have been issued to the latter than to the former (T. 2468, [fol. 4951] Exs. 741-744, T. 1166, 4557, 4488, 4614, Id. Ex. D-39, Exs. D-47, D-48, D-123-129, T. 1170; Id. Ex. D-39).

68. Such a franchise to independent small exhibitors and to circuits is advantageous at times both to the distributor and to the exhibitor as it gives the distributor an assured outlet in the town, saves the expense of going back and selling the town each year, and it gives the exhibitor an assured supply (T. 4489, 4559, 3946, Ex. 190).

69. Independent exhibitors and affiliated exhibitors regarded clearance as of much importance and sought and believed that it improved the receipts of the theatre having it (T. 2864, 3665-68, 2408, 2447, 2452, 2492, 2536).

70. Distributors in the general course of their sales policy send out salesmen to solicit theatres which the distributor desires to sell and to bring in applications for contracts, if they can be obtained, to the branch managers, who consider them. If they disapprove, they send the salesman back to see whether a better contract can be obtained, or if the branch manager thinks the contract an advisable one, he forwards it with his recommendations either to the home

office of the distrioutor or to the district manager, who in turn if he favors the contract forwards it to the home office. No contract is made until the general manager at the home office has approved the contract, and no one except such manager has authority to approve a contract (T. 4492, 4513, 4555, 4563, 1508, 1428, 1435, 1392, 1401, 1407, 1522, 1528).

71. It is estimated that about 1% of Paramount's film rental revenue came from the Schine Circuit (T. 4609).

72. It does not appear that in negotiating with the Schine Circuit any distributor has pursued any abnormal policy (Plaintiff's Admissions T. 4615-4618, T. 4334-4356, 4478, 4375, 4476, 4376-4378, 4556, 4605, 4415, 4386, 4508, 4604, 4397-4398, 4401-4421, 4487, 4554, 2468, Exs. 741-744, T. 1166, 4557-4559, 4488-4489, 4614, 2864, 3665-3668, 2408, 2447, 2452, 2492, 2536, 4508, 4609, 3946, Exs. 190, D-143, D-144, D-170).

73. To the knowledge of the general sales managers of the respective distributors, Fox, Loew's, Paramount, RKO, United Artists, Universal and Warners, there has not been any conversation with any of the defendants or their executives or employees not to deal with any competing exhibitors or to restrict the terms of such dealings (T. 4381, 4385, 4490, 4510, 4560, 4564, 4585, 4613).

[fol. 4952] 74. Schine did not in the course of negotiations for the acquisition of any theatre at any time say to the prospective seller that if he did not sell to Schine he would have difficulty in getting product for his theatre. Schine did not say to any such person that if he did not sell to Schine he would open up another theatre in the town. Schine has not told any one else to make any such statements in negotiating for theatres for Schine. Schine was not at the time of any such negotiations aware that any one had made any such statements. Schine has not said to any one that he approved of their making or having made any such statements. Schine has not asked any distributor to suggest to any person with whom Schine was negotiating for a theatre, or for any interest therein, that unless the

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* The reference contained in Nos. 27 to 69 inclusive are to formal admissions made by the plaintiff in connection with the defendants request for the admission of facts pursuant to the Rules of Civil Practice. Also references on the pages where testimony was given.

theatre or an interest therein was sold to Schine, it would be difficult for the theatre to obtain product. Schine has not in any conversation with any employee of Columbia, Fox, Loew's, Paramount, RKO, United Artists, Universal or Vitagraph said that any one of them should not deal with a competing exhibitor to Schine. Schine has not written any such statement to any of them. Schine has not said to any one of them that if they made such a sale Schine would not buy from them elsewhere in the Schine Circuit. Schine has not for the acquisitions of theatres made any threats or misrepresentations.

75. No competent or properly qualified witness was produced by the plaintiff upon the trial to testify as an expert, as to what constituted reasonable or unreasonable clearance, or as to the factors which must be considered in determining whether clearance is reasonable or unreasonable.

III. Striking and Eliminating from Any Findings of Fact Heretofore or Hereafter Made Any Statement or Language Which in Substance Constitutes a Conclusion of Law or Involves a Conclusion of Law and Any Statement or Language Which is Not Warranted by the Evidence and Exhibits. Without Limiting the Generality of the Foregoing Defendants Specify the Following Statements as Examples.

76. Any statement that any employee was authorized. This involves a conclusion of law. The facts of his position, relation and instructions, if any, should be stated, leaving the effect to be dealt with in the Conclusions of Law.

77. That "Schine could dictate to any of the distributors" should be stricken, as a conclusion of law and one not warranted by the evidence. "Monopoly," "monopolistic" and "monopolizing" should be stricken. They are conclusions of law and they are not warranted by the evidence.

78. "Arbitrarily depriving" should be stricken, as conclusions of law and unwarranted by the evidence: Schine [fol. 4953] did not deprive any other theatre of product. Schine bought the product for Schine's theatres from the respective distributors. The result, that other exhibitors could not get the product which had been licensed to Schine, is not depriving and is not arbitrary.

79. "Unreasonable" as applied to clearances should be

stricken from the text in which it has been used, because it was not related to any monopolistic control of commerce among the several states, and because length of clearance in the amounts stated in the facts are not *ipso facto* unreasonable in the absence of evidence that the competitive relations were not such that this clearance would improve the prospect of attendance in the same competitive area at the defendant's theatre, and that this was the purpose sought and the effect obtained. (See proposed Amendments 27-30.)

80. The terms "threats" should be stricken. It involves a conclusion. The facts of what was said and done complete the narrative of facts. The evidence does not warrant the conclusion of law that the things said and done were threats. A reference to the dictionary meaning of the term in law suffices to show this, namely:—An expression of an intention to inflict loss or harm on another *by illegal means, especially when effecting coercion or duress of the person threatened.* There were no threats within the common meaning of the term.

81. "Lowering admission prices" should not be stated without a statement of the circumstances. The evidence shows that under the circumstances there was no lowering not required by local conditions.

82. "Predatory" should be stricken, because it is a conclusion of law and not a statement of fact, and is not warranted by the evidence. What was done and said completes the narrative of the facts. A reference to the dictionary definition of the term shows that there was nothing predatory, namely:—Plundering, practising rapine, given to robbery, pillaging, living by preying upon other animals, damaging crops or buildings, as predatory insects or birds.

83. No statement in substance that any one of the defendants conspired with any other of the defendants to restrain trade among the several states should be made in the statement of Findings of Fact, because whether the conduct described amounted to a conspiracy between any of them as a conclusion of law, and also because such a conclusion is not warranted by the evidence. The Findings of Fact should be confined in this particular to what each defendant did with any other defendant, so that the question of law, whether or not this constituted a conspiracy between them in restraint of commerce among the several states may

[fol. 4954] be presented on the face of the Findings of Fact without the need of resort to the evidence, or absence of evidence, to warrant any such conclusion.

84. No statement in substance that any distributor conspired with any of the defendants in restraint of trade among the several states should be contained in the Findings of Fact, because whether the conduct described in the findings constituted such a conspiracy is a conclusion of law, and also such a conclusion is not warranted by the evidence with respect to any one of the distributors. The Findings of Fact should state what each did so that it will be unnecessary in determining the question of law, to refer to the evidence or the lack thereof, and the correctness of any conclusion of law can be determined from the statement of the facts found.

IV. Striking out the following conclusions of law 1, 2, 3, 4(a), 4(b), 4(c), 4(d), 4(e), 4(f), 4(g).

V. Making the following additional conclusions of law,

1. The defendant Schine Chain Theatres, Inc., is entitled to judgment dismissing the complaint as to such defendant.

2. The defendant Schine Theatrical Co., Inc., is entitled to judgment dismissing the complaint as to such defendant.

3. The defendant Schine-Lexington Corporation, is entitled to judgment dismissing the complaint as to such defendant.

4. The defendant Schine Enterprise Corporation, is entitled to judgment dismissing the complaint as to such defendant.

5. The defendant Schine Circuit, Inc., is entitled to judgment dismissing the complaint as to such defendant.

6. The defendant Chesapeake Theatre Corporation, is entitled to judgment dismissing the complaint as to such defendant.

7. The defendant J. Myer Schine, is entitled to judgment dismissing the complaint as to such defendant.

8. The defendant Louis Schine, is entitled to judgment dismissing the complaint as to such defendant.

9. The defendant John A. May, is entitled to judgment dismissing the complaint as to such defendant.

[fol. 4955-4956] VI. AMENDING THE JUDGMENT ACCORDINGLY BY STRIKING OUT ALL PROVISIONS THEREIN AND ENTERING JUDGMENT FOR THE DEFENDANTS AND EACH OF THEM DISMISSING THE COMPLAINT HEREIN.

VII. THE DEFENDANTS RESERVE THE RIGHT TO AMEND and/or SUPPLEMENT THIS MOTION UP UNTIL THE TIME FINALLY SET FOR HEARING HEREOF.

Respectfully submitted, Edward F. McClennen, Samuel S. Isseks, Willard S. McKay, Attorneys for the defendant.

Each of the above named attorneys appears for each of the above named defendants separately.

[fol. 4957] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PLAINTIFF'S MOTION PURSUANT TO RULE 52(b) TO AMEND THE COURT'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Plaintiff moves the Court to amend the findings of fact, conclusions of law, and judgment in this cause, dated October 31, 1945 and entered herein November 1, 1945, in the following particulars:

1. In the place of Finding of Fact No. 22, substitute the following:

22(a). At Corning, Lexington, and in other situations Schine's film contracts called for lower minimum admission prices than those for independents on subsequent runs, and minimum admission prices were omitted from Schine's contracts, although the contracts of his independent competitors specified minimum admission prices.

(b). In Corning, New York, during the seasons 1933-34 and 1934-35, Schine operated the Fox and State Theatres, playing ahead of the Plaza Theatre, which was independently operated. The latter reduced its adult evening admission price for the reason that it could obtain major product only on second or third [fol. 4958] run. The State Theatre cut its admission prices several times, going as low as 15 cents. The Warner contracts for the 1933-34 season provided for a minimum admission price at the State of 15 cents and a similar admission price at the Plaza. The Plaza contracts in evidence prohibited it from charging less than 15 cents. The Fox contracts for the 1933-34 season permitted Schine's State Theatre, with a 60-day clearance over the Plaza, to charge an adult evening orchestra admission price five cents lower than the Plaza was required to charge. Fox's contract with Schine for first run at the Fox contained no minimum admission price requirements. Metro's 1933-34 contract for Schine's State Theatre omitted any minimum admission price requirement, as did the Universal contract for the State and the RKO contracts for the Fox and State Theatres in both the 1933-34 and 1934-35 contracts.

(c). In Lexington, Kentucky, Schine acquired four theatres in November, 1936. At that time, Schwartz, an independent, operated the Opera House. Schwartz at all times from 1936 maintained a 16 cent night price. During the summer of 1937 and throughout 1938, Schine cut its admission prices at some of its prior run theatres. Schine's contract with Fox for the 1936-37 first run product provided for minimum admission prices in Schine's Lexington theatre for the first run showing of Fox pictures.

Despite the existence of this contract, Schine cut its admission price below the minimum prices fixed (R. 2888-2892). Schwartz complained to Fox and Paramount about these admission price cuts by Schine (Ex. 209), and the Fox branch manager brought these cuts to the attention of the Fox home office (Ex. 200), advising that Schine's:

[fol. 4959] * * * are advertising these prices (16¢) exclusively within a radius of sixty miles of

Lexington, with the result that all surrounding towns are complaining to us and other distributors.

The home office in turn complained to Schine about these cuts, calling attention to the fact that they were in violation of the contract (Ex. 201), but Myer Schine merely replied that the cuts were "quite essential and proved to be beneficial" (Ex. 202). Fox then omitted all minimum admission price requirements in the Schine second and third run contracts for the succeeding seasons (Exs. F-49, 122), while at the same time providing in its contract with Schwartz' Opera House for minimum evening adult admission prices of 15 cents for that theatre (Ex. 829).

(d). Schine complained to United Artists about the admission prices charged by an independent exhibitor in competition with its theatre at Norwich, New York. Schine also complained to Loew about the admission prices charged by an independent exhibitor operating in competition with its theatre at Bellevue, Ohio, demanded that Loew refuse to sell him films for a second run in that town, and Loew agreed not to sell him such a run.

2. Insert the following additional finding of fact as No. 11(j):

(j) In a number of situations Schine maintained closed theatres, or theatres operated for brief period for the purpose of intimidating potential competitors. Schine renewed leases from time to time on such theatres and expended considerable sums of monies in paying renewal rentals.

3. Insert the following additional conclusion of law No. 4(h):

[fol. 4960] (h) Controlling the existence and extent of admission price differentials between Schine's and other competing theatres by agreement with distributors and by demanding that distributors refrain from licensing other theatres charging admission prices objectionable to Schine.

4. Amend Conclusions of Law 5(b) by striking the semicolon and adding the words "and from attempting to con-

trol the admission prices charged by others by agreement with distributors, demands made upon distributors, or by any means whatsoever;", so that 5(b) reads as follows:

(b) From demanding or receiving clearance over theatres operated by others which unreasonably restrict their ability to compete with a theatre owned or operated by a defendant, or corporations controlled by it, and from attempting to control the admission prices charged by others by agreement with distributors, demands made upon distributor, or by any means whatsoever;

5. Amend Conclusions of Law 5(c) by striking the semicolon and adding the words "and from entering into any film franchise", so that 5(c) reads as follows:

(c) From conditioning the licensing of films in any competitive situation outside of Buffalo, New York, upon the licensing of films in any other situation, and from entering into any film franchise;

6. Amend paragraph 2, Section II, of the Judgment by striking the period and adding the words "and from attempting to control the admission prices charged by others by agreement with distributors, demands made upon distributors, or by any means whatsoever;", so that paragraph 2, Section II of the Judgment reads as follows:

[fol. 4961] 2. From demanding or receiving clearance over theatres operated by other which unreasonably restricts their ability to compete with a theatre owned or operated by a defendant or corporation controlled by it and from attempting to control the admission prices charged by others by agreement with distributors, demands made upon distributors, or by any means whatsoever;

7. Amend paragraph 3, section II, of the Judgment by adding the words "and from entering into any film franchise", so that paragraph 3, section II of the Judgment reads as follows:

3. From conditioning the licensing of films in any competitive situation outside of Buffalo, New York, upon the licensing of films in any other situation and from entering into any film franchise.

8. Add a section V to the Judgment, to read as follows:

For the purpose of securing compliance with this judgment, and for no other reason, duly authorized representatives of the Department of Justice shall, on the written request of the Attorney General or the Assistant Attorney General in charge of antitrust matters, and on notice of any consenting defendant reasonable as to time and subject matter, made to such defendant at its principal office, and subject to any legally recognized privilege, (1) be permitted access, during the office hours of such defendants, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendants, relating to any of the matter contained in this judgment, and (2) subject to the reasonable convenience of such defendant, and without restraint or interference from it, be permitted to interview its officers or employees regarding [fol. 4962] any such matters, at which interview counsel for the officer or employee interviewed and counsel for the company may be present.

Information obtained pursuant to the provisions of this Section shall not be divulged by any representative of the Department of Justice to any persons other than a duly authorized representative of the Department of Justice except in the course of legal proceedings to which the United States is a party, or as otherwise required by law.

Respectfully submitted. Robert L. Wright, Louis B. Schwartz, Special Assistants to the Attorney General.

Wendell Berge, Assistant Attorney General.
George L. Grobe, United States Attorney.

[fols. 4963-4964] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

Civil No. 223

UNITED STATES OF AMERICA, Plaintiff,

v.

SCHINE CHAIN THEATRES, INC., et al., Defendants.

SUPPLEMENTAL JUDGMENT—Filed Nov. 13, 1945

The judgment dated October 31, 1945, and entered November 1, 1945, in the above cause be, and it hereby is, amended to add the following paragraph:

"V. Paragraphs 1 to 7, inclusive, or paragraph II of this judgment shall go into effect thirty (30) days from November 8, 1945."

Enter

JOHN KNIGHT
United States District Judge

Dated, November 8, 1945

No objection to the entry of the foregoing supplemental judgment.

ERNEST S. MEYERS
Attorney for Plaintiff
WILLARD S. McKAY
Attorney for Defendants.

Approved
as to form
G. L. G.

[fol. 4965] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK.

[Title Omitted]

TRANSCRIPT OF HEARING ON MOTIONS PURSUANT TO RULE 52 (b) OF THE RULES OF CIVIL PROCEDURE.

Proceedings before Honorable John Knight, United States District Judge for the Western District of New York, Monday, February 25th, 1946, at the United States Court House, Buffalo, New York, at 10 o'clock a. m.

Appearances:

Robert L. Wright, Esq., Philip Marcus, Esq., of counsel, Special Assistant United States Attorneys, for the Plaintiff.

Willard S. McKay, Esq., Edward F. McClennen, Esq., and Howard M. Antevil, Esq., appearing for the Defendants.

[fol. 4966] PROCEEDINGS

The Court: We have two motions here, have we?

Mr. Wright: Yes, if the Court please.

The Court: All right, Mr. McClennen.

Mr. McClennen: This case, if your Honor please, No. 223, United States against Schine, is before your Honor this morning on the defendants' motion to amend the findings of fact by the removal of some of what we urge are conclusions from the findings of fact and the addition of other facts which we urge are essential to the judgment to be entered.

The motion to amend the findings of fact carries with it, of necessity, motions for changes in the conclusions and in the judgment consequent on those changes.

The plaintiff also has filed a motion for changes in the findings of fact by additions thereto. That motion I will defer speaking on until later.

The defendants' motion was filed on or about November 10, 1945. Before coming to the particulars of it, I will speak of certain general features which I may repeat myself on, as we go on with the details.

The judgment as now entered has as its most drastic feature a provision for the dissolution, reorganization, or [fol. 4867] re-alignment of the defendants' circuit. That, of necessity, involves a determination of the characteristics and surroundings of the beginnings of the various theatres which are a part of that circuit. That is, we urge that the defendants should not be required to break up and dispose of their holdings without a judicial determination of the fact that the different holdings have been acquired in a manner which is contrary to law.

The Court: You mean the original holdings?

Mr. McClennen: The original holdings. To depart for a moment, in view of your Honor's inquiry: The cases in which in order to remedy a found restrain of trade or monopolization, where they have resulted in any requirement for the disposal of any properties—and I use the word "disposal" in the limited sense—have been cases in which the

property to be disposed of had in its acquisition elements of violation of the Anti-Trust Act. The normal remedy where that acquisition has been contrary to the Anti-Trust Act is the return of that property to the sources from which it came, not a turning over of that property to other members of the industry involved. The difference between such a decree, such a judgment, as is now in the draft entered [fol. 4968] about November 1, 1945, and all other cases is emphasized by a recent occurrence.

The plaintiff has just filed a proposed plan of dissolution, re-alignment, or reorganization—whichever it may be characterized. There are many objections to that plan, which have not even been formulated yet, as it has only just been received. They are fundamental——

The Court: You mean that in reference to this case here a plan has been proposed?

Mr. McClennen: A plan has just been proposed by the plaintiff.

The Court: I have no knowledge of it.

Mr. McClennen: The objections are very fundamental. I refer to the plan for two reasons: One is it shows a plan, the design of which is to achieve a professionally desirable result, a professional triumph for the plaintiff, and not a just result for the parties, or a result that has within it any prospect of any help to the public interest in any way.

It is a plan designed to mutilate the defendant organization. To go into that takes time to formulate the definite objections which, of course, cannot be made now and make more explicit what I have said in general.

[fol. 4969] The other thing about the plan is that it has brought right into focus the vice in a dissolution, because it proposes to deprive the defendant of properties obtained with no violation whatever of the Anti-Trust Law or any other law—properties, the acquisition of which is not criticised by a vestige of evidence in this case.

It proposes to take from the defendants theatres in the towns where there never has been any competition, where the business was created by the defendants or the defendants' predecessors, where there is nothing whatever to indicate that requiring the defendant to part with its theatres would advance competition a particle; no indication that it would produce any result of a second theatre in the place; no indication that a second theatre in the place is desirable for the community served or needed there in any way.

Now that being the way in which the plaintiff proposes to implement this judgment of your Honor shows emphatically the importance of having the findings show the facts with respect to each of the theatres.

The Court: How many do you claim there are in that classification?

[fol. 4970] Mr. McClennen: There are about 70 places where the defendants' entry into the town was either by buying, building, or leasing substantially the only first-run theatre in the town. Now, the numbers in other details I am not able to state to your Honor, because I have just read the plan through but once, and deem that I should not take any of the valuable time of today on that, as today is devoted to this question of the effort to have the findings amended. But I have referred to it for the purpose of bringing before you this very emphatic reason why we should have in the findings of fact themselves the facts on which a judgment on any dissolution or order for the disposal of any theatre is based. No judgment, I believe I may say emphatically, can with propriety be made that a theatre shall be disposed of unless the facts concerning that theatre are in the findings of fact which are the basis of that judgment.

Going now to the details of the motion: We have asked for certain substitutions, certain striking out, and certain additions. It was the proposal of the defendants to make their objections to the plaintiff's draft of findings of fact, and what would have been the essence of this motion, before [fol. 4971] the findings of fact were made. We got the draft in the very latter days of October—I haven't in mind the date now—and were at work upon the proposed changes which we wish to urge when we got word that the draft which the plaintiff had presented had been signed by the Court; so that our only remedy was an after-judgment remedy, which we pursued by this motion to amend.

Not only did we have no opportunity to call attention to the specific objections to the plaintiff's draft, but this is a case in which today is the first oral argument on the facts of the case, and, therefore, this, except as it is predicted by our motion as filed, is the first time to bring to your Honor's attention what we submit are the true facts of this case with respect to the way in which the defendant obtained the properties which it is now sought to wrest from the defendant.

The first paragraph of our motion, as filed on or about November 10, 1945, is for a substitution of another paragraph for the paragraph 3 of the findings as drafted by the plaintiff. That substitution contains all the facts that are in the plaintiff's paragraph that the evidence will warrant, and adds these things:

[fol. 4972] In the paragraph as filed there were set out the numbers of theatres acquired in different periods. We have asked that in order to make that complete and in balance this important addition be made:

"Among the theatres in which Schine became financially interested there are 25 theatres situated respectively in 16 towns, Auburn, Bath, Canandaigua, Carthage, Corning, Gloversville, Herkimer, Little Falls, Newark, Norwich, Oneonta, Oswego, Salamanca, Saranac Lake, Syracuse and Watertown, New York, which had belonged to Schine before 1930 and had been leased to the Fox-Metropolitan Circuit in 1929, and which reverted to Schine in 1933 as a consequence of the termination of the leases in the Fox-Metropolitan bankruptcy proceedings. The result of this reversion was that it was necessary for Schine to resume the operation of the said theatres. At the end of the year 1930 Schine had no motion picture theatres, except suburban theatres in Buffalo and Rochester, motion picture theatres in Cortland, East Rochester, Fairport, Rockport, Geneva, Malone, Medina and Ogdensburg, and a half interest in Amsterdam, and a theatre under construction in Bellefon-[fol. 4973] taine, Ohio."

Those facts, of course, come from the evidence introduced by the plaintiff. They are not in controversy in any way. They are important facts as showing the circumstances under which those theatres were re-acquired in 1933 or relapsed back into the Schine hands in 1933.

The other features in this paragraph which are added are these—and before I read them, let me preface: This is the paragraph in which it is set out that Schine held theatres in so and so many closed towns. What we have to urge here is it is, of course, no violation of the Anti-Trust Act to build the only theatre in town, to buy the only theatre in town, to lease the only theatre in town. There is in that no element of violation of the Act in any way. The term "closed town" is a trade term, but if read out of the trade,

and in a judicial decision, would run the chance of it being thought that Schine had closed the town.

Of course, in these cases he had not closed the town he had—if he had done anything—opened the town where he built a theatre where there was none before, or he had kept open the town where he had bought a theatre where there [fol. 4974] was one before, and there is no element of closing in that.

We urge these words to take care of that possibility for error:

"At the date of the commencement of this action Schine operated motion picture theatres in 59 towns in which Schine owned the only motion picture theatres operating in such towns. In most of these towns, all of the theatres had been operated by a single owner, and *was* so operated at the time of the acquisition of the same by Schine. In the other 17 towns there were theatres operated by other than Schine. Since 1928, including the 35 theatres reverting from Fox-Metropolitan, the number of theatres in towns in which there was no opposition theatre increased by 56. In most of these no theatre, or not more than one theatre, had operated before Schine began operating there. Schine built, bought or received a lease of its first-run theatre in each of the above mentioned 73 towns in the ordinary course of the expansion of its business."

Now there again there is no going into any question that is a matter of controversy in evidence. This comes out in the facts that have been put in evidence by the plaintiff, and [fol. 4975] not by the defendants.

The next, that is, paragraph No. 2 of the motion, is asking a substitution for No. 4 of the plaintiff's draft. This is not at variance with what is said in the draft, but a precise statement of the facts as they appear in evidence.

"Schine has expended for the cost of land and buildings acquired by it the sum of $6,509,100.00 and for the cost of building additions and improvements the sum of $4,439,000.00. These expenditures were made in the normal course of the developments of Schine's business for the purpose of conducting the exhibition business locally in the respective cities and towns so attractively to patrons as to make the business profitable, and not for the purpose of acquiring any monopoly or restraining interstate trade or commerce

or for the purpose of driving any other person out of the exhibition business."

Now there are uncontroverted facts as brought out from the evidence, introduced by the plaintiff, and not requiring recourse to the defendants' evidence.

The Court: Would that last sentence be consistent with the decision of the Court, that last sentence commencing with [fol. 4976] "These expenditures were made in the normal course of the development of Schine's business"? Would that be consistent with the decision of the Court?

Mr. McClennen: I should think so. I find in the decision of the Court no statement of facts of any dollar that has been expended in any other way.

The Court: Well, there might not be a specific statement in that respect, but——

Mr. McClennen: Well, I urge that if there is any specific fact that we are entitled to have it stated in the statement of facts.

The Court: But I say that that last clause would be inconsistent with the decision of the Court itself.

Mr. McClennen: Not inconsistent with any finding of the Court.

The Court: All right, go ahead.

Mr. McClennen: That is, our urging is that the conclusions and judgment are not warranted by the findings of fact that has been made, and if there is anything that has been expended for this purpose in the acquisition and improvement of these properties, that was done for any other purpose than just that, then those facts should be stated in the findings of fact; otherwise a judgment has been entered not [fol. 4977] supported by the findings of fact.

But I urge upon your Honor that if the sums be taken, theatre by theatre, the sums expended to buy those theatres, the sums expended to build those theatres, the sums expended to improve those theatres—for these are the moneys that we are talking about—there is not evidence of a single dollar that has been expended for any other purpose than the one which I have stated, and the test of the accuracy of my assertion is that there be pointed out any piece of evidence that shows anything to the contrary.

The Court: Well, I think there were pointed out some specific purchases which the Court has found were purchases for the purpose of extending the monopoly.

Mr. McClennen: That, if left with no more, amounts to a statement that everything that Schine has done in the way of going into the theatre business, buying theatre buildings, theatre——

The Court: Well, I mean in my decision I pointed out certain instances where properties were bought, and the circumstances under which they were purchased, as an element going to show the purpose to effect a monopoly.

Mr. McClennen: But not in these sums of money that are [fol. 4978] listed here.

The Court: Well, I don't know about that. You will have to tie down specifically the items making up these expenditures.

Mr. McClennen: Well, they are all right in a single sheet of paper, showing the payment for each place.

The Court: All right, go ahead.

Mr. McClennen: Now this suggestion of your Honor's brings forcibly forward Gloversville: Here was a man with nothing, starting a theatre on a shoe string there. That operating has gone on for 28 years. Is he to be charged with having put his money into that enterprise for the purpose of monopolizing trade?

The Court: No, I don't think so.

Mr. McClennen: Well, I have spoken of one. Now, we may go down the list and find again and again and again just as clear cases of absolutely nothing except the effort to expand the theatre business, to put theatres into towns, or to improve theatres in towns, for the purpose of making those profitable enterprises, and with no other object in view. The expansion of this circuit to the size that it has grown has been for the purpose of having a large business, [fol. 4979] and the fact that as a result of it being a large business it has a position where it can deal in the industry, properly get the material for operating its business, does not betoken an intention to monopolize; it betokens an intention to grow big, just as any energetic, capable, diligent man may grow big by the exercise of his abilities, his industry, and not for the purpose of injuring the business of others but for the purpose of progressing in the business that he is engaged in building up.

Now if there is in this, as I have urged upon your Honor, and as investigation of the evidence will disclose, some 70 towns that way, then this money which your Honor has put into the findings is not, I urge, justly to be found to be money

that has been invested for the purpose of monopolizing. It has been expended for the purpose of building a great business where there was not a business before.

That is applicable to the very great majority of the towns in this circuit, and towns which it is suggested ought to be wrested from the defendant where there is no wrong connected with the original entry into that town in any way.

The third paragraph of the motion asks for a substitu-
[fol. 4980] tion for finding No. 5 as drafted by the plaintiff. That is but a slight change.

The Court: Yes, I see.

Mr. McClennen: That is the paragraph that tells about the eight so-called major film companies, and adds: "Other major distributors not classified with the eight are Monogram and Republic."

The Court: There isn't much change in that. Where is the change in that?

Mr. McClennen: Just that: "Other major distributors not classified with the eight are Monogram and Republic."

The Court: That is all I could see. I thought it was substantially the same.

Mr. McClennen: The fourth asks a substitution for No. 6 of the plaintiff's draft. No. 6 of the plaintiff's draft says, "The individual defendants hold the principal offices in the defendant corporations and hold other offices in the various so-called local corporation-."

The Court: What changes do you want there?

Mr. McClennen: That we ask this for:

"One or more of the individual defendants held one or more of the principal offices in the defendant corporation and other offices in the various so-called local corporations. [fol. 4981] None of the individual defendants own any stock in any of the corporate defendants, nor have they owned any stock since August 31, 1931, except that John May owned 1331 shares of the Class A common stock of Schine Chain Theatres, Inc., which stock he disposed of on February 19, 1932, and except that J. Myer Schine, Louis W. Schine and John A. May owned from time to time various shares of the preference stock of Schine Chain Theatres, Inc., (a non-voting stock, except in certain contingencies provided for in the certificate of incorporation.) The preference stock was retired by the corporation on March 1, 1944. The duties and authority of Lazaar, Silverman,

Hensler and Insley were in each instance subject to the supervision and direction of the executive office at Gloversville. Negotiations for the licensing of motion pictures was generally carried on in the first instance by Lynch. He negotiated generally with the respective distributors through their respective division managers in New York. Any proposed contracts resulting from such negotiations were subject in every instance to approval on the part of the distributors by their duly authorized representatives (generally the general sales manager), and on the part of [fol. 4982] Schine by Lynch's superiors.

Occasionally agreements between Schine and the respective distributors took the form of what is known in the industry as a 'master agreement' supplemented by 'deal sheets,' but this was by no means the invariable practice."

Now, I will hand to your Honor later the specific references where these facts may be found in the record.

Now the fifth is for change in No. 7 of the plaintiff's draft. No. 7 as the plaintiff drew it said "The great film buying power of the defendant corporations gave opportunity to exert pressure on the distributors to obtain preferences."

We urge that that should not be in a findings of fact. It is a conclusion. And I submit that plaintiffs are in error in submitting any such conclusion as that.

There was no pressure exerted by Schine on the distributors. The distributors were very much bigger fellows than Schine was; the distributors, where there were other theatres, had all the opportunities of that competition in their dealings with Schine, and where there were not other theatres, each distributor was in competition with each [fol. 4983] other distributor for the sale of his products, and they were not subject to that which may properly be concluded to be pressure, a conclusion and not a statement of a fact of which there is any evidence.

We urge as the finding instead: "The circuit had the normal influence of a very large buyer with each of the distributors. This improved the opportunity of the Circuit to make more favorable terms than a small customer. The extent of this film buying is demonstrated by the large number of theatres controlled by Schine and the large amount of money which had been paid and was to be paid for film rentals." And so on through that paragraph.

We are asking that there be put in there the plain, full statement of what the evidence shows, and not the——

The Court: Well, that is really a substitution of the entire sixth, isn't it?

Mr. McClennen: They are all substitutions.

The Court: I mean, it is a big substitution.

Mr. McClennen: Well, it is substitution of their very own words, except in the particulars that I read.

"This buying power included both towns in which there [fol. 4984] was no opposition exhibitor, called "closed" towns, and those in which there was an opposition buyer, sometimes called "open" towns. The negotiations for film for the different theatres were conducted sometimes separately and sometimes involving more than one town. Sometimes the contracts were made——" So on it goes down through, containing the facts that are in the plaintiff's draft. Now, if your Honor please——

The Court: Well, as I see it, it doesn't conform to the plaintiff's draft of 6.

Mr. McClennen: It is a substitution for the plaintiff's draft, and if I may say so, we claim that our draft of the findings is just as persuasive to me with the Court as the plaintiff's draft of a finding.

The Court: What I had in mind was the question whether you were substituting some paragraph or some sentence, rather than making a redraft of the whole paragraph, don't you see? You have redrafted the entire paragraph, that is the point.

Mr. McClennen: It is our draft of the findings that ought to be made, I urge your Honor.

The Court: I was looking for the extent of it.

Mr. McClennen: We do not believe in this peculiar circumstance where the findings as signed by the Court are [fol. 4985] made by the plaintiff's draft, we do not deem that we are before this Court limited to asking merely for an amendment of the plaintiff's language. We are here asking for findings of fact that will be as ample as the evidence warrants, and as explicit as the evidence makes it to be. And under the circumstances we urge that these paragraphs be taken not by comparison with the plaintiff's paragraphs, except to show what the subject matter is. This is not a matter of having the findings drafted by the successful parties, and I plan to go back of the final draft.

Again and again in the findings we find the very language of the plaintiff at the earlier stages, so that what is signed by the Court here is traceable directly to the plaintiff's language and accomplishes, I submit, the very thing that the Supreme Court and Court of Appeals has reprobated, that is, that a decision of the Court on the facts ought not to be in the language of the successful party. They have said it in so many words. It puts us in the position of having to try to frame our findings of fact onto the plaintiff's language or as nearly as we can without violating the evidence.

[fol. 4986] The solution, I submit, is a return to the evidence and observing whether what we ask for findings are not in truth the findings which the evidence shows, regardless of what the plaintiffs put into their draft.

As I say, the references will be handed to your Honor so that they will be available.

The sixth is for a change in the eighth paragraph as drafted by the plaintiff. Now, in that paragraph are contained six things which are conclusions and not statements, and which can be tested as to their accuracy in any court only by going back to a laborious investigation of the evidence.

The purpose of Rule 52 in so carefully distinguishing between facts and conclusions was so that there might be spread into small compass by a comprehensive statement all of the facts that any Court would have need to consider in determining what is the right judgment. Now in there are contained words which we submit are—and which we wish to be in a position to submit with as little recourse to the evidence as possible to show the correctness of our statement—conclusions that we urge are not supported by [fol. 4987] the evidence and which, even if they were, should not be in the narrative of fact, and the plaintiff's counsel should not have put them there.

They are "Monopolistic control", "Arbitrarily deprived", "Unreasonable clearances", "Making threats", "Lowering admission prices", "Making long-time franchise agreements".

Now, the first, of course, is the worst effort of the plaintiffs in their draft. That "Monopolistic" is a conclusion. Rule 52 provides there will be set out the fact and then there can be determined whether such a conclusion is warranted by the facts set out in the findings.

"Arbitrarily deprived". That is a conclusion, whether it was arbitrarily or deprived, and we respectfully submit that the plaintiffs have asked for an erroneous conclusion in both respects. The simple statement of fact there is this, that when Schine built or acquired the theatre in the town Schine negotiated for and got for the future pictures, first-run, and, course, when he obtained them they could no longer be sold; they had already been sold to him and were not available for sale to the others. But no case of buying pictures except for the purpose of his theatres, no depriving, no taking away from a man a chattel or a picture which he [fol. 4988] already had, which is the thing that happens in every case where a man buys what is the only thing of that kind: When he buys it, somebody else can't buy it.

Now, there was no depriving, there was no taking away a picture which a man already had under contract. It was simply that after one buyer had bought it, others could not buy it. And it was not done arbitrarily. It was done for the purpose of operating the defendant's theatres. That is what he bought for. That is not arbitrary. That is the rational thing that any theatre operator does. He licenses the pictures required for his theatre. That is not an arbitrary act in any sense, and I submit that the plaintiff should never have asked for a finding of such a conclusion as that.

The next is "Unreasonable clearances". I will deal with that more at length when coming to clearances. But whether clearance is unreasonable or not is a conclusion, and should not be stated in the findings of fact.

The findings of fact ought to set out what the clearance was in the different places, then to show whether the circumstances in evidence disclose that those were unreasonable.

[fol. 4989] "Making threats". Now, if your Honor please, it will come later in some detail. Paris is one of the places that is mentioned later. The evidence with reference to that all came from the plaintiff's witness Schwartz. I think he was the man. And he specifically said that no threats of any kind were made. And what the plaintiff is endeavoring to do is to have a conclusion tucked into the findings of fact instead of stating the facts of what was done. And we have later asked to have those facts stated in full as the plaintiff's evidence shows them to be in every

case where there has been any statement or intimation that there was anything like a threat. We submit that that conclusion should not have been stated here and should never have been stated, because the facts do not warrant calling it a threat.

Of course, the primary meaning of "threat" is an expression of intention to do bodily harm, to do an act which is primarily to injure the person addressed. These statements in each instance were statements of nothing of the kind. They were statements before the defendant did what it did that it was going to do that thing.

I submit that if the defendant desires to have a theatre [fol. 4990] in a town and there is a theatre there, that to throw any obstacle in the way of the defendant in doing that is the very reverse of what Anti-Trust Acts are designed for. The man who has the theatre in the town hasn't acquired any right to keep another out of the town, and, if the defendant, having determined that it is good business for him to have a theatre in the town, says "We are going to build a theatre in this town unless we can buy yours", he has done an act which is entirely proper if, at the time he does it, it is his intention to build a theatre if he can't acquire one by purchase.

And that is the type of thing that occurred in a number of these places that have been taken up for specific criticism and where no misstatement of any kind was made, no threat of any kind was made, but merely this type of statement that I have just referred to.

The Court: Well, the testimony with reference to that Paris situation was that the defendants told Schwartz that they would build in Lexington, another place in which the independents had a theatre, and not specifically that they would build another theatre in Paris, the town in which [fol. 4991] the independents were operating.

Mr. McClennen: When we come to the place where Paris and Lexington are described we have the facts right in as they occurred, but what we are urging is that there be no statement of a conclusion of this kind, that there be a statement of the fact.

This draft, putting this sort of thing in here, was just in line with the attitude of the plaintiff's counsel in starting the case—a dreadful thing, I submit. The issue in this case is what the remedy should have been. If this were

on a criminal proceeding the defendants would be subject to heavy penalties. A monstrous way to approach a case! I submit, a monstrous way to approach a case!

Here we were, before a Court of justice, seriously presenting the facts of the case, and expecting the case to be tested by the evidence presented to the Court, and that there should be no thought of remedy until it was determined what had been done and whether that calls for any remedy, and that there should be no suggestion of what might have been done in a criminal proceeding when this wasn't a criminal proceeding, and when it was obvious that there never could be got from any self-respecting Grand Jury [fol. 4992] an indictment or from any self-respecting trial jury a conviction.

Now here this is the same sort of thing, endeavoring to get into a findings of fact these things which are conclusions, without stating the fact in the findings of fact.

If the facts amount to these things, on our draft, when we get to that point, they will be in the conclusions, but there should not be a prejudgment by conclusions before there is a statement of the fact.

Now instead of eight we have put in so much of the facts as appear in the sixth number in our motion:

"'The means and method employed by the Schine Circuit in carrying on its business were numerous. The Circuit required so many pictures for its theatres that its purchases frequently left no first-run, and sometimes no second-run, pictures for other theatres in the same town. Schine sought to obtain clearances in the competitive areas against subsequent runs and obtained them to the extent hereinafter set out. These clearances provided that subsequent runs of the pictures could not be shown in the areas described [fol. 4993] until after the number of days stated in the clearance terms.''

Now that is all that is in there. The detail is dealt with when we come later to those different matters of procedure.

"Schine made agreements with some of the distributors for the supply of product for a period of more than one year, as hereinafter set forth. Such agreements are described herein as 'franchises'. Schine made these franchise agreements so as to get a definite assurance of the product for the times stated in them. The respective

distributors who entered into the agreements made them for the purpose of having an assured output for the places stated and for the time stated."

Now that is what the evidence shows; and all that the evidence shows with respect to that matter of franchises.

Now while I am anticipating, I might as well do it here and have it out of the way: Franchises are now a matter entirely of past history. On the 19th of May, 1942 a consent decree was entered in this case. It entirely did away with franchises. There have been no franchises since, and no reason to anticipate that there will be any franchises. There is, as is known to your Honor, in the [fol. 4994] Southern District of New York, a consent decree in the motion picture industry case of the United States against Paramount and others. Some suggestion has been made that your Honor may have thought that that had run out. It has not run out as to franchises; it has not run out as to clearances. It is still oper-ative. I will hand your Honor, if I may, an informal print of that decree that shows that fact.

Incidentally, the findings of fact that we submit state on their face that they are made for a period ending May, 1942. That was the express statement of counsel for the plaintiff when we started the trial before your Honor, and there is no evidence of anything after that date playing any part in the evidence in this case, on the facts of this case or on what would be required for remedy or relief in this case.

The next is our No. 7, asking a substitute finding for No. 9. Here again is, I respectfully submit, an improper suggestion in the plaintiff's draft that you should find as a fact some specific instances showing the predatory means used by Schine.

"Predatory means", also "Arbitrarily depriving the [fol. 4995] independent," these same detailed statements of conclusions, not a fact, and, we submit, conclusions not warranted by any evidence.

Just think, if your Honor please, what predatory commonly means when you hear it: Birds which kill other birds to live on them, which destroy crops. Why should a court of justice be asked to use in a statement of a finding of fact any such language as that?

The Court: You find that statement in the opinion, don't you, the use of that term?

Mr. McClennen: I found the use of that term in the opinion.

The Court: Yes.

Mr. McClennen: Taken from the findings requested——

The Court: Oh, no, in the opinion, in the decision, you will find the same expression.

Mr. McClennen: Yes, if your Honor please, and in the findings requested before the opinion.

The Court: Yes, I know.

Mr. McClennen: That word came in from the plaintiff's——

The Court: Well, your criticism, as directed to the Government, is also directed to the Court as well.

Mr. McClennen: I think not, if your Honor please, because a court of justice, dealing with counsel for the United States, would very likely be impressed with the language [fol. 4996] used by the counsel for the United States.

The Court: I gave the use of the word careful consideration.

Mr. McClennen: And if it is to be taken as a criticism of the Court's language, it is merely that the Court has improvidently, I submit, used the term.

The Court: When I say I used the word advisedly, understand me, I knew what it meant, when I used the term. With respect to the use of the word in the proposed findings, I think it was in the proposed findings, as you say.

Mr. McClennen: Then the eighth asks for a substitution of other paragraphs for No. 10 and 11 (b) and 11 (f). They were thrown into two paragraphs in the plaintiff's draft, but seem to be of the general character of 10.

Here are these same words of threat spread throughout, and subject, I respectfully submit, to the just criticism which I have made in reference to the other.

Now, instead of that we have put in just what the facts were:

"In 1937 Schine took up for consideration the possibility of building an additional theatre in Canandaigua when there [fol. 4997] was prospect of the construction of a large veterans' hospital that would bring several hundred families into town. The planning and finishing of the theatre took about two years. During this period a sign was put

up. By whom does not appear. The sign bore no signature, either written or printed. It was erected on a lot occupied by Montgomery Ward & Co., called the Flanagan lot. It said something about a new theatre to be erected by Schine or the Schine organization, or some such thing like that. The newspaper in Canandaigua published an article that the Schine Circuit was going to build a new theatre. The new theatre was built, not on the lot occupied by Montgomery Ward & Co., but on another lot, for which Schine paid $15,000 for the land and structure on it and paid in addition for building the Lake Theatre, $38,500. This new theatre, the Lake, was a theatre of 400 or 450 seats, of fine construction, eqnipment and decoration."

Now that is the whole of the story with reference to Canandaigua that the evidence shows Schine had any connection with.

Then we go to Paris:

[fol. 4998] "In Paris, Ky., in October, 1937, Schine received a license, pursuant to the city ordinances to erect and operate a new theatre. Schine proceeded to have plans drawn and got bids in the spring or summer of 1938 and completed a new theatre in 1939. In November, 1938, Harry Schwartz, about four months after he knew of the proposal for the new Schine theatre, obtained a lease of property in Paris. Lazar asked Schwartz if he had not seen the sign on the lot Schine had purchased some time ago and that they were going to build a new theatre on it, and Schwartz told Lazar that he had. Lazar said they had every intention of building a theatre in Paris and were not decided on just what type or what size, and that is why they had not begun earlier, and that he felt that Schwartz was making a mistake in building in competition with them, and Schwartz told him that he did not think so or he would not have signed a 20-year lease on the main corner of the town, and that he felt that he had the best location in Paris, and that he felt the theatre would be self-supporting. Lazar asked him if he would not go to meet him at the Lafayette Hotel, and Schwartz said that he would be glad to do so and went later in the day to the Lafayette Hotel. Lazar said that [fol. 4999] he did not feel that Paris could support three theatres and that as long as they had been in Paris operating a theatre and had anticipated building a new larger theatre,

he could not quite understand what would prompt Schwartz to go into the town as competition."

I think I needn't read down the whole of that. It is right in the language of the testimony, what was said and what was done in this section. I can see no just reason that the plaintiff can urge why that narrative of the evidence should not go in as the facts to be found. If the phraseology departs from the evidence, isn't warranted by the evidence, well and good: specific things can be pointed out, if there are any. We have tried to make it so that there are none.

Now we come to Perry:

"In Perry in July, 1935, Schine bought the Davis property a little below the hotel, at a corner on the Main Street. Thereafter Mr. May called on John C. Herzberger, the operator of the Auditorium Theatre, and introduced himself and said that he had just closed a deal with Porter Davis, buying a lot for Schine, on which they were to build a theatre seating 1,000 persons and costing about $100,000, and that [fol. 5000] he hoped that they would be friends. In August, 1935, Herzberger met Myer Schine at the Seneca Hotel in Rochester and Schine offered Herzberger $5,000 for his lease from the Town of Perry of the Auditorium. An agreement was signed subject to the approval of the Town Board to the sale of the lease, and to expire on September 1. In August, 1935, the Town Board wanted Herzberger to stay and would not let him sell the lease. Schine received the blue prints for a new theatre in Perry, dated September, 1935, and specification therefor, and the time fixed for receiving bids for construction was October 4, 1935. In September or October, 1935, Mr. Osborne of Dipson & Osborne, came to Mr. Herzberger several times about taking over his lease, and for more money than Schine had offered, and Herzberger made a deal with them and continued to manage the theatre for a year. Dipson improved the theatre at a substantial expense of about $13,000 and made the theatre a satisfactory theatre and removed any occasion for having another theatre built in the town. Before this improvement the theatre was not at all a modern theatre but had been built in 1898 for stage performances. After rebuilding it had about 700 seats, as Dipson reseated the theatre. [fol. 5001] Dipson & Osborne later sold this lease to Schine and Schine made additional improvements to the theatre at a cost of $7,500. No other theatre has been built in Perry."

That is a complete statement of the evidence—a complete statement; no more is shown.

"In Salamanca, in October, 1924, Schine became the lessee of the Andrews Theatre, 735 seats, and in 1927 bought the land on which the new theatre was subsequently built. The original cost of the land was $24,300, to which Schine added a building and improvements at an additional cost of $164,300. Under an agreement with Fox-Metropolitan, Schine undertook to construct a new theatre on its land in Salamanca and to lease it to Fox-Metropolitan. This agreement was terminated and the theatre was not then erected. Schine took the new building project up with the architects in mid-summer of 1938 and sent blue prints of the land to the architect on August 23, 1938. The plan to complete the theatre in 1939 was held up by lack of materials, which could not be obtained, and the completion and opening was in August, 1942. The new theatre is a very lovely theatre, air conditioned, with modern equipment, with about 1200 seats. In December, 1938, C. R. Dickerson, manager of the [fol. 5002] Schine theatre in Salamanca, came into the office of the publisher of the newspaper, Salamanca Republican Press, and told him that the Schine Company would build a new theatre in Salamanca and that the architect was at work on the plans, calling for completion in the following May. The publisher wrote and published an article to this effect in the Salamanca Republican Press on December 24, 1938."

There is the whole statement of the facts for Salamanca as they occurred.

"In Medina, Ohio, Yudelvitz and Willis were lessees and operators of the Princess Theatre as a first-run theatre, with all the first-run product they wanted. By January 1, 1937, they had learned that Fine and Essick, with a circuit of some 29 theatres, an independent circuit, that is, not connected with any producing company, were proposing to come into Medina in opposition to them. Thereupon Yudelvitz and Willis negotiated with Schine and on March 18, 1937 entered into an agreement with Schine to come with them and to build a new theatre. At almost the same time the Masonic Lodge of Medina entered into the reconstruction of their building with a theatre in it. In March, 1937, they [fol. 5003] wrote to Schine asking him not to go ahead with

the plan to build a new theatre in Medina. In September, 1937, through negotiations with Yudelvitz and associates, Schine became interested in 50% of the lease of the Princess Theatre, which Yudelvitz and Willis were operating. After the reconstruction of the Masonic Temple building, the new Temple Theatre alone was ample for the town, but the Princess was not. Before the new theatre, the Temple, opened Yudelvitz was playing Metro, Paramount, Fox, RKO and Republic pictures (the last named because with the western stars, Ken Maynard and Gene Autry, he wanted to play Republic on Fridays and Saturdays, although he was not forced to do so from any lack of product.) The Princess continued to have the first run produet required for the operation of that theatre. Essick and Fine could not buy the same product which had already been sold to the Princess for the same run. In April, 1939, after extended 'cross the table' negotiations the Schine and Yudelvitz interest-s became interested in 50% of the lease of the Temple Theatre, the other 50% being retained by Essick and Fine, who also acquired a 50% interest in the lease of the Princess, so that in April, 1939, and thereafter the interest in the two leases [fol. 5004] stood, Yudelvitz 25%, Schine 25%, Essick and Fine 50%. Schine said nothing to Essick and Fine by way of threat. In the operation of the Medina Temple Theatre the town has been very well served and the worth while pictures of all the distributors from time to time have been exhibited there."

That is a full narrative of the facts with reference to Medina, and I submit that those facts show nothing in violating the Anti-Trust Act in the things done, nothing that was not proper. There is no reason why Yudelvitz and Willis, apparently aware that a new circuit was coming in, shouldn't get ahold of Schine to come in with them; and the pictures that they could get for their theatre, they were entitled to get; and in no way was there anything by way of threats or any msiconduct of any kind whatever.

But whether there is or not, if that constitutes misconduct, it will be in the statement of facts, so that it will be available for whatever is the proper conclusion to be reached on those facts.

"In Mt. Vernon, Ohio, Mr. Smoots, the owner of the Vine Theatre and lessee of the Memorial Theatre, brought the matter of going into Mt. Vernon to Schine's attention

[fol. 5005] and proposed to lease the Vine to Schine and to assign his lease on the Memorial, which was then closed. At about the same time Mr. Platt, who operated the Lyric, said that he would like to sell Schine the equipment and lease of the Lyric provided he could get a job to manage the theatres in town, and this deal was closed about February, 1934. Schine became the lessee of the Vine Theatre and of the Memorial Theatre in January, 1934, and of the Lyric Theatre in February, 1934, and of the Memorial again at the end of December, 1940. The Lyric location was the finest location in town. In April, 1938, on the Lyric site and on additional land bought, Schine built the new Vernon Theatre. The new Vernon Theatre is a modern fireproof constructed theatre with a wide marquee in front, no stores, a large lobby, and in the interior decorated in very modernistic style, with the finest seats obtainable. It has all the other equipment and a fine mezzanine furnished attractive and comfortable, with fine public spaces upstairs and downstairs. The cost was from $120,000 to $130,000."

Those facts are not open to controversy, and we submit they should be in the findings.

The ninth asks for a substitution for 11 (a), (e), (h) and [fol. 5006] (i), and the others we have not asked for any change.

The Court: All right.

Mr. McClennen: 11 (b) and (f) were in the preceding one.

The Court: Yes, I noted that.

Mr. McClennen: There again is the word "threat" used as to Bellefontaine, and what we ask is this:

"At Bellefontaine, Ohio, in 1930, a delegation from Bellefontaine called on Mr. Schine with reference to the establishment of a new theatre in Bellefontaine. At this time the Schine Circuit was operating in only eleven cities and towns. These were all in New York State. As a result of the call of this delegation Schine acquired land in Bellefontaine in 1930 and built the new Holland Theatre, which was opened on February 12, 1931."

At this time Schine was a small circuit, he had parted with 25 theatres and had theatres only in these nine places, and no theatres in Ohio. I think I am right in that.

I go on reading: "It was of the latest type of first class moving picture theatre. At this time Milton A. Mooney, as a lessee, was operating the Strand Theatre. He operated the Majestic Theatre during the annual fair week, and in the [fol. 5007] year- 1928 to 1931 he closed it entirely. It was a small, old converted store show, without equipment for sound pictures. He also had the Opera House, an upstairs house, seventy-five years old, without sound equipment, and closed except for an occasional stage show. The Majestic and the Opera House were of no value, and the balance of the lease of the Strand and its equipment, which had been used for seven years, was all that Mooney had to sell. In May or June, 1931, Mooney saw Mr. May, who offered $2500 for the lease, and Mooney sold the balance of the lease of the Strand and its equipment in July, 1931. The lessor of the Strand was one Butilla. It had been made in 1924, expiring in 1934. Gutilla then renewed the lease until 1938. This negotiation was with Mr. May or with Mr. Lazar. In these negotiations, Mr. Lazar said that if the Strand lease was not renewed and Gutilla operated it, Schine was going to play second-run at the Opera House, on which he had a lease. The Opera House had been closed from 1932 to 1934 and open from 1934 to 1936 as a second-run house. From 1932 to 1934 it had been open about six or seven months. Gutilla had his final negotiations for the lease with Mr. Schine."

[fol. 5008] That is the whole of the occurrences in Bellefontaine.

The Court: Well, you criticize the use of the word "threat" by the Government as a conclusion. Yet in your proposed findings you say, "Schine said nothing to Essick & Fine by way of threat."

Mr. McClennen: That is the testimony of Essick.

The Court: Well, you criticize the use of the word "threat" by the Government here as a conclusion, do you not?

Mr. McClennen: I am criticising the use of the word as a conclusion based on the evidence. The witness testified that no threat was made to him. That was a truthful piece of testimony. We are merely asking a finding of that fact.

The Court: Well you say, "Schine said nothing to Essick & Fine by way of threat." You use the word "threat." That is what I had in mind.

Mr. McClennen: Well I used it because the witness testified that no threat was made to him.

The Court: All right. But it is a conclusion when it stands alone, when you don't say anybody testified to that. When you say, "Schine said nothing to Essick & Fine by way of threat," that is a conclusion as to what the testimony of the witness is.

Mr. McClennen: It would serve the same purpose if it was [fols. 5009-5010] put in that form. I put it in as a direct paraphrase of the witness' testimony.

"At Lockport, N. Y., Schine began to exhibit in 1922. He bought a large building which had been a skating rink and then used as a garage, and converted it into a modern large motion picture theatre, the Rialto Theatre. It had great advantage over any other theatre in Lockport because of its downstairs seating capacity. It cost, for original purchase, $27,500, and for improvements $118,400. In October, 1927, Schine became half owner in the lease of the Hi-Art Theatre and of the Palace Theatre constructed several years after Schine had opened the new Rialto. The Rialto had been playing the best first-class pictures and the Palace played vaudeville and pictures and part of the time pictures only. Later Schine discontinued vaudeville at the Palace and moved the best pictures into the Palace and played first and second-run at the Rialto. Schine was forced out of the Palace Theatre in December, 1932. Before this Schine had negotiated for contracts for the 1932-33 product sufficient to operate two theatres which Schine was then operating. The owner of the Palace thereupon opened the Palace. The Rialto was showing all the product of the eight companies [fol. 5011] except Metro. Schine, on losing the Palace, remodelled the Hi-Art, to be operated in place of the theatre that he had lost. Before reopening the Hi-Art, Mr. May made an offer for the Palace and stated that Schine was withholding opening the Hi-Art for an additional few days for him to decide whether or not he would accept the proposal, and that Schine would reopen the Hi-Art to play the product under contract. The owner of the Palace was unwilling to accept the offer. The Hi-Art, which had been closed during the seven years that the Palace was operated, was reopened."

Now, that is the exact statement of the facts there and shows the significance of the words used about reopening

the Hi-Art. Schine had been operating for a long time two theatres in that place and he lost the Palace, and the only way in which he could operate two theatres was either to renegotiate a lease for the Palace or open up the Hi-Art, and he told the man that he was negotiating with that if he couldn't get the Palace he was going to open up the Hi-Art, and he did so.

That, I submit, is an entirely proper business transaction. It is not a transgression of the Sherman Anti-Trust Act, [fol. 5012] or any other law in existence.

At Seneca Falls we have set out exactly the facts of what occurred: Buying the theatre, setting up a sign that it would reopen soon after alterations as the Schine theatre, and that an independent who was without financial resources and was seeking to acquire the means of building the theatre discontinued his efforts for two years, the sign reappeared on the Seneca, the theatre did not reopen, the independent did not raise the money. That is the story of the facts there.

The Court: Well, we had better suspend now till 2 o'clock.

(Whereupon a recess was taken until 2 o'clock p. m.)

[fol. 5013] After recess, 2 o'clock p. m.

Appearances: Same as before noted.

Mr. McClennen: If your Honor please, I had reached the tenth paragraph which asks a substitution of 12. There again is the use of the word "arbitrarily." We ask a statement of the fact, in that we believe this fully covers the substance of that paragraph:

"In any town in which Schine bought motion picture product for a specified run, it was of course impossible for any other theatre to buy such product for the same run. This condition existed in Auburn, New York, Lockport, New York, Mount Vernon, Ohio, Paris, Kentucky and Bellefontaine, Ohio. In such instances the operator of the other theatre would buy a different run or from a different distributor."

Then eleven is as to No. 13. That, as drawn by the plaintiffs, had in it the word "monopolizes," and named particular places.

We ask this substitution: "At Corbin, Medina and Lockport, Schine had the first-run product. In Corbin, Schine

was the licensee of this product before there was any other theatre in town. One of these theatres, the Hippodrome, [fol. 5014] was a much more substantially constructed and more expensive theatre than the new theatre that was built. The facts as to Medina and Lockport have been stated hereinbefore.

In Rochester, N. Y., Schine had the first-run neighborhood product for the Riviera, State, Dixie and Liberty theatres. These included the best neighborhood houses in Rochester. The Fenyvessy theatres took clearance over all other Schine Theatres in Rochester. Schine had these first neighborhood runs before the independents acquired their theatres."

Then No. 12 is as to No. 15, and we ask this substitution:

"In certain cases when Schine purchased or acquired a lease of a motion picture theatre or theatres as going concerns, an agreement was made with the former operator which provided that such operator would operate the motion picture theatres within limited competitive areas for limited periods of time. In certain instances this noncompetitive agreement covered nearby towns other than the towns in which the former operator had been in business."

That fully states the facts as they appear in evidence. [fol. 5015] No. 13 is asking a change as to the franchise agreement. There again, in 13, we have narrated at length all the features referred to in the original, without characterization but stating what those agreements contain.

14 is asking a change in 17. This is the long one relating to clearance. Now that has in it a statement of the clearances at certain places without description. Here was an entertaining illustration: After your Honor had stated the length of the clearances in your opinion, you said it is true that some of these were over third-run. Plaintiff puts in the clause nearly like your opinion, but with no reference to that very important distinguishing fact.

Now, so far as clearance is so concerned, we submit that the facts to be found here—if they are to be found at all—about clearance should show the places and the length, and the distances. For instance, very strikingly: The 45-day clearance for Gloversville, containing no reference to the fact that Johnstown, the place cleared, is only three miles away. And it comes right after the statement that some of these clearances were as near as 20 miles. One has to [fol. 5016] search the evidence to find out that the place

next referred to with a 45-day clearance is only three miles away.

Now clearance is not just a matter of distance, just a matter of time, but involves a trial of the circumstances to show whether or not it is unreasonable. The purpose of clearance, that for which it has long been established, is so that instead of the owner of a picture having it shown in one place only once, in which event all the value of it would be got on the first run, this plan has been adopted by which it may be shown in other theatres at subsequent runs, provided they are so placed that they don't take away from the patronage that would be available to the first run.

The owner of the picture is entitled to all the return to be expected from that picture in the neighborhood. He gets a larger either percentage or flat rental for the first run, and is directly interested in having the box office receipts in that theatre large. And clearance does not become unreasonable until it so extends the time or the area as to put an inhibition on a later theatre which will do no good to the theatre cleared.

The consent decree lays down the principles to govern in determining whether clearance is reasonable or not. [fol. 5017] None of those things are presented here. There is no testimony that the clearance exceeded that which was needed for the protection of the first run. There is direct evidence from the plaintiff's witnesses that some of the places cleared were competitive, although in different towns; and none of the requirements to establish unreasonable clearance are presented in the case.

It has been urged that it was unreasonable merely because of the length of time and merely because of the distance. Now it is a known fact that greater distances than that, and greater lengths of time than that, affect the first runs, and there is nothing in the distance or in the length that in itself establishes that the clearance is unreasonable.

We urge first that the facts should be stated, what the clearance is, what the distances are, and so much of the competition, as has been shown in evidence, and that the matter stop there, not attempting to try out clearance that is not in this case, where no evidence has been offered, and particularly when there is now no occasion whatever to take the time or call for the labor of a court of equity on that subject because of this comprehensive provision as to [fol. 5018] clearance that is contained in the consent decree,

so that if there is any clearance taken that is more than it should be, the remedy is right there available without the need of any injunction in this proceeding.

There is this also to be said about this clearance provision: In this paragraph there has been introduced these statements of branch managers, for instance, to their district managers or home office, expressing their views as to clearance. We have urged that those are not admissible in evidence, and in the course of the opinion, the Court, in dealing with the question of admissibility, used words indicative of a possibility that findings might be made of these things without reference to the letters. Then, in this clause comes the test of the letters. We urge that right where that is stated it should be stated that these were received over the objections of the defendants. Then, if we are right in our objection, that must go out. But if it is put in here as a fact, without disclosing the fact that it is taken out of those objectionable letters, we do not have the means, without going extensively into the testimony, to show that this was one of the objectionable letters. That [fol. 5019] is, if the Court deems the letter admissible, and then found a finding of fact upon it, we submit that it should be shown at that point, that that is based on the letter that is objected to.

The Court: Well, doesn't that appear in the record? The ones that were stricken out were specifically stated.

Mr. McClennen: Yes, true. But if your Honor please, the idea of Rule 52 was to make the record as simple for the use of the Appellate Court as could be.

Now where a letter that is objected to is put right into the text of the opinion, even if the letter is described by the sender and the recipient, it takes a reference to that, and to the exhibit, to explain that this is a piece of evidence subject to objection. Whereas, it does no harm to anybody, and greatly conveniences both the upper Court and counsel, if it appears right there, so that that burden doesn't have to be met.

The Court: You want it to appear where, you mean?

Mr. McClennen: Well, we put it in in this form:——

The Court: There is more than one instance of that.

Mr. McClennen: About a third of the way down on our page 12 in 14:

"The inter-department communications between employees of major film companies and some letters writ-

[fol. 5020] ten by Schine employees are stated below. Among these are communications by Lehman of United Artists, Pielow of Metro, D[illegible]a and Sauber of Universal, Smith of Warner, Sussman and Grassgreen of Fox. These communications were admitted in evidence over the objection of the defendants, pursuant to a ruling that it was within the scope of their duties to make the representations in the communications, and that they did it as a natural incident of the office, namely, a branch or district manager. None of these persons were called as witnesses by the plaintiff and no attempt was made to qualify them as experts upon the subject of clearance, or to ascertain what factors they or any of them considered in determining whether any given clearance was reasonable or unreasonable."

Then there is stated, as we have noted before, the contents of those letters, and no one is obliged to go extensively into the record to show the relation between the objection to evidence and the finding of fact, but it is clearly and concisely stated there.

The Court: It would seem to me it would lumber up the findings in your case if you would have to put into the findings the rulings of the Court on evidence submitted all [fol. 5021] the way through the case, wouldn't it?

Mr. McClennen: I am not suggesting that the objections be extensively dealt with; I am suggesting it be presented right there by a sentence so that it shows that the source of these things stated here in the communications was objected to.

The Court: Of course, on first thought I wouldn't think that that would be proper in the findings. You have your rulings and exceptions to the testimony as it is in the record.

Mr. McClennen: Yes, if your Honor please, but if this isn't stated in this way, then it becomes necessary not only to show what we submit is the error in the ruling, but also the prejudice that has resulted and makes necessary to show that Exhibit No. 42, if you please, is the one that contains the language that you have quoted in your findings and then in that way to show that we have been prejudiced by the receipt of that exhibit, by its being introduced into the findings.

Now, no conceivable harm is done to any one if that simplification takes place of showing that these were not

communications that had come in in ordinary course without [fol. 5022] objection, and it does not make it necessary for the Court of Appeals to go into the record, or be taken into the record by these extensive references and cross references. They are all in one place, and no one is hurt by it in any way.

The Court: Well, it seems to me it would be establishing a wrong principle, because in that course of pursuit you might ask the insertion of the evidence pertaining to any question concerning which you raised objection and objection was overruled.

Mr. McClennen: Well, I should submit that where a finding is made based entirely on objection to evidence that it is a principle that is not an objectionable principle, one that simplifies the work of the Court, which is the design of the rule, and does no harm to any one—relieves a great deal of unnecessary labor on the part of the upper court and of counsel, and particularly is it of some significance here because here it was stated in the opinion that the same results might have been reached without a reference to these objected to exhibits. That is put in the opinion.

Now here we wish to show, in as concrete fashion as possible, that here something has gone in which, if we should [fol. 5023] prevail in our objections, should go right out of the findings—and we have not complicated the record in any way, but simplified it by that course.

Now in dealing with clearance we have asked on pages 13 and 14 of our motion for a statement of the facts of the industry with reference to clearance. These facts are mainly drawn from the plaintiff's admission of facts. They are concrete, they are in short compass, and they tell the story in the admittedly correct words of what clearance is and what its purpose is, and what the actuating motives are in general course of the industry in determining clearance. They are essential to knowing just what clearance is and what are the considerations which indicate whether there was anything monopolistic in obtaining the clearance, as distinguished from seeking to get all that could be got from the picture in its first run.

The 15th is asking a substitution for the 20th, which states that special privileges were granted, as in the case of bank nights, and so on. Those were spoken of as special privileges, and the evidence shows that they were not

special to Schine; that they were regular things. We have phrased it in this way:

[fol. 5024] "In certain instances the distributors made contracts providing for film rental based upon a percentage of the gross receipts and in certain other instances, the rental was a flat rental. When a percentage picture was played, with a competitive device (bank nights, etc.) sometimes provision was made for the deduction from the gross receipts of the cost of such competitive device before computing the distributors rental. These provisions were also in contracts with independents."

Now that is the fact. There is nothing indicative of special privileges or special benefit of any kind in such a clause. It is recognized that the box office receipts at a first-run picture may be enhanced by the fact that there is a double feature, another feature shown, and they may also be enhanced by the fact that there is a bank night or other attractive device which costs money to put in. Those are proper costs of the exhibition, and proper, therefore, to be deducted by agreement from the box office receipts before the percentages apply. It is an entirely reasonable proposition. It shows no indication of an intention to do a special favor to the particular exhibitor. It is a common provision and is made for independent exhibitors as well [fol. 5025] as for circuit exhibitors.

Now in our numbers 16, 17, 18 and 19 we have made requests for changes of language to take out anything that is of a conclusion nature by simply stating the facts as they appear in the evidence. A comparison of each one of those paragraphs with the evidence shows that they state fully all that is contained in the plaintiff's draft which the evidence warrants.

That brings me to the second general division of our motion, which begins on page 15, and the first paragraph of that is No. 20. The purpose of that is to make clear the date that we are speaking of:

"All findings made herein with respect to any acts committed by the defendants or any of them or any course of conduct pursued by them which the Court holds to be in violation of the Anti-Trust laws are limited to acts committed or course of conduct pursued prior to May 19, 1942,

plaintiff's counsel having stated at the opening of the trial that he would not offer any evidence beyond that date."

Otherwise, on casual observation, it might be thought that the findings were showing the conditions which existed [fol. 5026] in 1946, when, as a matter of fact, they show conditions that existed not later than May 19, 1942.

The Court: Doesn't that appear in the opinion?

Mr. McClennen: But not in the findings.

The Court: But doesn't it appear in the opinion?

Mr. McClennen: I think it may. But not in the findings, and as the findings, under Rule 52, should be self contained, that provision should be in the findings. There is, of course, no dispute about the fact.

Now the next numbers, 21 to 26, relate to the capacity in which the different individuals acted as far as they acted. That is, they were acting, as far as they acted in these matters, for the corporation.

It becomes of special importance because in a very recent decision the Supreme Court actually struck out the injunctive provisions that had been entered below against the individuals because, although the individuals had done the very acts that were to be prohibited in the future, they had done them only as officers of a corporation; it was a corporate act, and wasn't contemplated as an individual act.

I respectfully submit that there is no way of distinguish- [fol. 5027] ing that position which the Courts took in that case from the case here.

In addition to that, there is the fact that—well, conspicuously, Louis Schine, among the individual defendants—there isn't any evidence that Louis Schine has done anything in violation of the Anti-Trust Act. He has cooperated in every way—this is dealing with him as individual. There is no evidence that he has taken any step in violation of the Act. The evidence is that J. Myer Schine was the policy making officer, the executive head of the corporation. There is no indication that any others did anything except as it is shown—the conversations they had, the steps that they took—and those were not taken as individuals in their own right or in their own interests, only as officers of the corporation as far as they came within the authority that they had or those acts were approved later by the corporation.

Next we have from 27 to 32. Those are statements that are in the exact language that the plaintiffs have admitted to be the facts. They are right in the admissions, in the admissions which were introduced in evidence in this case, [fol. 5028] and they are facts about which there can be no controversy and which have a very substantial bearing in interpreting the things that were done in this case to show whether or not they are abnormal and had a significance on that account, or were normal in accordance with the ordinary business methods of the industry.

We urge that most clearly 27 to 32 should all be in.

The Court: In 32, shouldn't that be 70 per cent instead of 80 per cent?

Mr. McClennen: Well, I should have to refer to the record, which I haven't here.

The Court: That is what the admission was, as I have it here.

Mr. McClennen: A comparison with the admissions will, of course, show what is the right figure.

Now, 33 to 72 differ from what I have just been referring to, in that there is no specific admission on the record that it is so, but they are from testimony of witnesses as to the methods of the industry, testimony not in the least——

The Court: Well, you pick me out certain parts of the testimony——

Mr. McClennen: That is, 33 to 72?

[fol. 5029] The Court: In 34 you have the statement that the positives at times run into millions of dollars and that if it is in technicolor the cost runs much higher.

Mr. McClennen: Well, yes, I would have to refer to the testimony. Now, all of these are facts of the industry that bear upon the reasons for the methods pursued, the necessity for successive runs, the necessity for clearances sufficient so that an adequate number of prints, endurable in the matter of cost, will make it possible to serve all the theatres that are to get the prints. In this instance, each one of these statements has the testimony reference against it. We hope that these references bear out the findings requested. These are additional to the findings so far made.

The Court: In 43, I don't think findings should show efforts of the distributor and of the exhibitor.

Mr. McClennen: Well, one of the things that the exhibitor is vitally interested in is that a picture showing in

one theatre will not draw directly away from another theatre, playing the same picture. That is particularly the exhibitor's desire, as well as the distributor's.

The Court: Well, wouldn't that be a conclusion, the same as you claim with respect to some of the other findings [fol. 5030] signed, the effort of the distributor and exhibitor?

Mr. McClennen: Well, that is the testimony of what they try to do.

The Court: That runs down to——

Mr. McClennen: It runs to 72.

The Court: I have been all through these mostly.

Mr. McClennen: Then we come to the negatives. There is no reference in the findings—there was a reference in the opinion, but I think there is no reference in the findings which the plaintiffs presented about the denial of anything of the nature of a conspiracy in the relations of the distributors to each other or to Schine.

Now that fact that they did so testify is a fact in itself. That is, we had in the Interstate case the most concrete announcement that if you do not call the leading executives when it is claimed that there was a conspiracy by the concern itself, that their absence is some evidence of conspiracy. Now, we have shown that that does not exist in this case, because they have been called.

Of course, there is this very marked distinction here: The distributors were not parties as they were in the [fol. 5031] Interstate case, and there was a failure to call a party. Here we went beyond that, and called these non-parties to show the fact that nothing was to be inferred from their silence. There was no one else to call. They weren't under our control. We had to get them here. We couldn't just tell them to come and they come.

The fact that we couldn't get them here would have been an excuse for their not testifying. But we got them here, and so, as to each one of these distributors, in these periods in question, came this evidence of the men who, if there has been any agreement, concert of action of any kind, would have been the ones who would have known of it.

They have testified that there was none, and there is nothing to impugn their testimony in any way.

We are not asking here to have some Government witness disbelieved because these men have come and testified. We are not asking in this that any fact, even if it be

adverse to us, or any conversation or any dealing, should be found differently from what the evidence for the plaintiff shows it to be, because of a contradiction. We are meeting the inference that might be drawn from the fact that these [fol. 5032] men who would know of a conspiracy, if there was one, had not testified. The mere fact that they testified is a fact in itself which we submit most certainly should be incorporated into the findings of fact. There is no witness that can be pointed to that would have known about this conspiracy of the distributors, if it was a conspiracy, that has not been called. We urge, therefore, that the request to find in paragraph 73 be granted.

Then we come to the same sort of thing: The policy maker of the Schine Circuit, the only policy maker of the Schine Circuit, Mr. Schine, testified, and we ask that what he testified be stated so as to show that no inference is to be drawn of a conspiracy from his failure to come forward and testify upon the subject. That is the 74th request.

Then is the 75th, which relates back to the subject of clearance:

"No competent or properly qualified witness was produced by the plaintiff upon the trial to testify as an expert, as to what constituted reasonable or unreasonable clearance, or as to the factors which must be considered in determining whether clearance is reasonable or unreasonable."

[fol. 5033] We believe that is very important because of the judicial determination in the consent decree in the case of the United States against Paramount, which lists the factors which determine whether clearance is reasonable or not, and shows that there has been no evidence offered of that character in this proceeding.

Then we come to special strikeout requests, and those are Nos. 76 to 84. The first of these deals with the same statement that I have referred to as they appeared from time to time in the plaintiff's draft of findings, that is, as to "authorized", "dictate", "monopoly", "monopolistic", "arbitrarily", "unreasonable threat", "lowering admission prices", without any statement of the surrounding circumstances, "predatory", and "conspiracy."

That question of whether the facts constitute a conspiracy or not is a matter not of statement of facts, but a statement of the conclusion to be drawn from the facts that are laid forth in the evidence.

Then there is put into the findings of fact this omnibus statement of monopoly and of two classes of conspiracy, one class, among the defendants, and the other, the class of conspiracy by Schine with the various distributors. And there [fol. 5034] has been put in this statement of both of those things.

We urge first the matter of conspiracy among the defendants: An act done by an officer of a corporation cannot be at the same time the act of the individual and the act of the corporation so as to constitute a conspiracy between that man and that corporation. It has been so laid down in the decisions and with none to the contrary.

Where you have a unit, a corporate unit, and an act done which is the act of an officer of that unit, that act cannot be both the act of the individual as an individual and the act of a corporation, as constituting a conspiracy.

Now this matter is a matter which, we submit, should not be approached until the point for the conclusions is reached, and then it should be so presented that it will be apparent that the conclusion is based on the statement of the findings of fact that have preceded the conclusion, so that it is not necessary to go outside the statement of the findings of fact when dealing with the matter on appeal but can be directly dealt with by reference to the findings of fact to test whether we are right or not in contending that there is no evidence of conspiracy.

[fol. 5035] We do so contend that there is no evidence whatever of a conspiracy of Schine with Schine Circuit or May with Schine Circuit, or these several other corporations. And, incidentally, there is not a word in the evidence that some of these corporations have done a thing. Not merely is there no evidence that they have done any thing that contravenes the Anti-Trust Act but, we submit, there is a complete absence of evidence of such a conspiracy by the defendants *inter sese*.

Then we come to the question of conspiracy with the distributors. Now we most earnestly urge that these distributors should be taken separately and tested to see whether there is any evidence against them. We have put them down alphabetically here. Of course, Schine did not conspire with Columbia, unless Columbia conspired with Schine, and you are asked here in this case to convict Columbia of a conspiracy with Schine.

Now, we urge that the evidence may be consulted, as a

whole or in detail, and that there is not a particle of evidence that Columbia conspired with Schine to restrain trade or to monopolize. All that Columbia did was to supply its pictures to what it deemed was its best customer under all [fol. 5036] the circumstances. In order to make what Columbia did a conspiracy to restrain trade, it must be shown that Columbia had knowledge that the motive actuating Schine in buying his pictures was not to get pictures for his theatres, but to restrain trade; not to get pictures on the best terms that he could, but to restrain trade. Now, there is in the evidence here none whatever of such a conspiracy.

Going back to the conspiracy *inter sese* of the defendants, we have this very striking thing: The decision in the Crescent case came down now a good many months ago. In their requests for findings of fact, the plaintiff's counsel took words of the Crescent case and put them in as is applicable in this case.

The Court: There was no opinion in that case? There was just the findings?

Mr. McClennen: Well, there was an opinion finally in the Supreme Court.

The Court: I mean in the lower court.

Mr. McClennen: In the lower court I think there were findings; I don't think there was any opinion.

The Court: There wasn't any opinion.

Mr. McClennen: And those words were taken so as, I re- [fol. 5037] spectfully submit, to misfit in this case, into a case that had already been decided, which was a different case. There there were different interests, not wholly owned companies, that had been brought into this combine that was ordered to be broken up. There is not a single reference to a corporation of the Crescent Circuit which was in truth a subsidiary of the circuit as a subsidiary. The references are to affiliated corporations, a term well understood as distinguishable from a hundred per cent subsidiary.

Where there are two corporations, and one owns all the stock of the other, and it is merely an instrument of operation of the major corporation, the action of those two corporations does not constitute a conspiracy. You cannot have a conspiracy between your left hand and your right hand. It is a unit.

In the Crescent case that was not the fact, and that language being withdrawn from that case into this case by the plaintiff's requests and arguments brings distortion

into this case. It is a difficult situation, an entirely different situation. Here there were no conspiracies, among themselves, within the defendants. There is a unit here. This [fol. 5038] Circuit is a unit in this matter, and the owner of the stock, all of the stock, of these many corporations that are sought to be grasped away from this Circuit.

Of course, there is such a case as Medina, where they don't own all of the stock, where they are not even the dominant owner. Essick and Fine own 50 per cent there and Schine owns only 25. And the cases are rare where there is any division of ownership. In most cases of these theatres which it is the effort of plaintiff's counsel to tear away from us, they have always been wholly ours; no other interest, no chance for any finding of conspiracy, no chance for any finding of monopolizing in that sense, because it is a unit. It is the case where one unit has built up this Circuit and owns this Circuit. Those are not acts of conspiracy.

The Court: Well, in your construction such an aggregation of entities would be exempt from the Statute? They couldn't commit a conspiracy then?

Mr. McClennen: Well, there is no question of exemption. You can't hold a man for conspiracy with himself, regardless of how many theatres he may have.

The Court: Well, it is a question of the relationship be-
[fol. 5039] tween the circuit members, the entities in the corporation.

Mr. McClennen: In that case there were different interests.

The Court: I know there were. But, if you are right in that construction, that goes to the very foundation of the Statute itself.

Mr. McClennen: I hope it does, but I hope, of course, your Honor doesn't go on to find that there is a conspiracy here just to hold us for conspiracy, if there is one.

The Court: No. I am speaking argumentatively, that is all.

Mr. McClennen: It is as simple, if your Honor please, as this statement: One man cannot conspire with himself; two men can conspire.

The Court: Well, that is the essence of the law.

Mr. McClennen: And it is the same whether they do it in their individual names or do it in corporations in which they respectively own all the stock. It is still one man deal-

ing with himself in this case, and in the other case one man with another man or more.

The Court: Of course, this case isn't that case, because you have in this case the representatives of different corpo- [fol. 5040] rations, not solely the one man, Schine. We have representatives of the different corporations committing certain acts as part of a conspiracy. It isn't as though it were a question of Mr. Schine, as though he did everything. Your parallel doesn't follow out, it seems to me, here anyway, even if you are right in your contention. If a corporation were being run by one individual, you might say, having no one who has anything to do with its operation except him, then your argument might be correct, because he couldn't conspire with himself. But you have a different case than that here.

Mr. McClennen: Well, there is no case, no instance here, where one Schine officer did this act with another Schine officer, each acting in his separate capacity. When an officer of a corporation takes a given step or has a given thought, that cannot be at once the thought of the corporation and the thought of the individual man himself—and I am speaking here in language of the Supreme Court when I make this argument. It is not any invention of my own, or anything that I have thought out first; it is there in the opinions.

There is this recent case where they actually didn't issue [fol. 5041] the injunction against the individuals who had done the improper acts, because they had done the acts as representing the corporation, and it was only the corporation that had acted in those acts.

Now, this is not bringing forward old and superseded law, but a very recent decision resting on exactly the same principles which I have urged upon your Honor with respect to this matter.

Now I have spoken of these in dealing, on page 24, with the paragraph having before it the Roman number four, asking the striking out of those various conclusions of law. Of course, that would involve striking the same conclusions from the judgment. I take it there is no occasion for repeating that with reference to the judgment, because, if we prevail in striking out those conclusions from the conclusions, they would fall from the judgment as a matter of course.

And the concluding paragraphs are for conclusions as a result of changes which we urge in the findings.

Now, of course, the most vital matter in all this is in this provision of the judgment directing that the defendants and their affiliated corporations be dissolved, re-aligned, or [fol. 5042] re-organized in their ownership, and controlled so that fair competition between them and the other theatres may be restored and thereafter maintained.

That is an utter impossibility of performance. Here are all these places where there never has been another theatre. How can we so dispose of ours, or re-align them, or located them, so that competition between them and other theatres may be created? It can't be created, but——

The Court: Well, that may be presupposed, that would fit right into the re-organization,—where there wasn't any competition. I don't think that would be an obstruction to carrying out the provisions of judgment.

Mr. McClennen: Well, if your Honor please, the plaintiff's counsel seems to have read this to mean that we must dispose of those theatres in towns where there never was another theatre.

The Court: Where did you get such a construction?

Mr. McClennen: In his plan that they have just filed.

The Court: Well, I don't know anything about the plan. I haven't seen it.

Mr. McClennen: Well, if your Honor please, attributing to plaintiff's counsel——

[fol. 5043] The Court: That plan may or may not accord with the judgment, I don't know.

Mr. McClennen: I know, but what I was about to say, your Honor, is this: If, in your judgment, you have used words that lead responsible counsel for the Government to think that you could have meant any such plan that they now have presented, it is a reason that your judgment should be couched in other language so that there be no misunderstanding.

The Court: Well, I had no definite plan in my own mind. I was, in effect, asking, you may say, the parties to agree on some plan.

Mr. McClennen: But when we start to agree on a plan we are called upon to present a plan for re-alignment, re-organization, or dissolution, in the terms of the judgment, so that fair competition between us and other theatres may be restored and thereafter maintained. And that can't be done, because the severance of these theatres from us will not produce any competition with those theatres. Some-

body else will be the man who owns the only theatres in town. There is no more competition than before. There is no more competition, because A. B. owns a theatre than because Schine owns the theatre.

The Court: Well, of course, it might apply from that stand-
[fol. 5044] point to those individual cases where no specific property was taken over by Schine or where nobody was claimed forced out of business, and Schine is the only one there. Now, there may be instances, as there are here, this case of the only theatre in town, where there is no reason for changing, you might say, except a general provision that you do not violate this law.

Mr. McClennen: Well, we couldn't make a plan that conformed to that language. It is an impossibility to write such a plan, because it involves just this thing, and I can't at the moment think of any case of a man who has parted to us with his theatre who wants it back—no case.

Now, he isn't helped out—the seller—isn't helped out by giving it to A. B., instead of to Schine. No public gain of any kind is to come from such a re-organization as proposed in this plan which has been submitted by plaintiff's counsel. The only effect of it will be to wrest from us these theatres, with no gain to the public, nothing done except to mutilate us.

The very matter that has been a matter for comment by the Court in New York in the case now going on—now, of course, I can't cite that case to you as a decision, or the [fol. 5045] statements made in the course of it as a decision of the Court of Appeals—but it is the fact that the utterances were the utterances of a Judge of the Court of Appeals, pointing out that what was up here was an effort to destroy, an effort to destroy an existing business, without showing anything better in its stead, and with the strongest indications in the language used that the Court would not tolerate such a thing being done.

I have said the time has not arrived for presenting the objections in detail to the plan, and will not arrive for some time to come. There are these things that I should like to lay before your Honor because they will eventually be presented, whatever is the plan presented:

One is the judgment we have appealed from on very fundamental grounds. After the changes in the findings which we move for have been made, I assume that a new, complete judgment will be entered if we have prevailed in

any of the changes that we request that are of value. If not, then the judgment as it stands is the one which is subject to the appeal which we have filed, and which the cases indicate is not yet ripe for allowance by your Honor until these matters are out of the way.

[fol. 5046] The matter of the plan is a matter of implementing the judgment. That is, the finality is in the judgment already, and the plan is a method of execution of the judgment, so to speak.

Now, I urge upon your Honor that it is waste motion to go into the details of a plan of dissolution or re-alignment until it is known whether the judgment is to stand. And, therefore, the time for any plan would be after the disposal of the appeal. Until that time it cannot be known whether there is to be an occasion for any plan of dissolution, and, therefore, we should urge that no plan be approved, and, indeed, no plan be considered, until the appeal is out of the way, and we know what is to be the finality in the case on these very fundamental questions that are involved.

The Court: Well, on the other hand, of course, if you agree on the plan there wouldn't be any need of any appeal.

Mr. McClennen: Yes, that is perfectly true. Of course, an agreed plan would be all right. But this plan which the Government has presented is not an invitation to agreement.

The Court: I see.

Mr. McClennen: That is, an agreement to have your head cut off doesn't seem likely.

[fol. 5047] The Court: You wouldn't want to agree to do that?

Mr. McClennen: We wouldn't agree to that. And nothing less than that seems to be suggested as appropriate for consideration by the Government.

The Court: My thought about it is that if you were to dispose of some 16 of these theatres early, don't you know, that perhaps some plan could be made upon which you could agree about the balance of the setup.

Mr. McClennen: Well, of course, if there were any possibility that the Government would accept a plan as your Honor suggests for a disposal of certain theatres, there would be the possibility that always exists for compromising a litigation. But there is no indication of any disposition whatever to do anything of that kind on the part of the Government in this case.

The Court: I see.

Mr. McClennen: And it is for that reason that I urge that the matter of plan for disposal, and any consideration of it or formulation of it, do not take place until the appeal is out of the way.

Now there is also the plaintiff's motion to amend the findings. This is the situation with respect to that:

[fol. 5048] The trial ended in November of 1944, the briefs were closed in on both sides by March of 1945, except for some supplements to bring to your Honor's attention later decisions that had been rendered; your Honor's opinion was handed down in early October, and the plaintiff's counsel then set to drafting findings of fact for your Honor's signature.

They had had all that time in which to determine what they urged should be in the findings of fact. It wasn't new. It was all laid out on paper before, and they come forward with a statement of findings in which they deviate appreciably from the opinion of the Court, but yet indicated that they might like some more, and didn't tell what they were.

We promptly, after those findings were in, made our motion for changes in the findings.

Now, about the first of February, 1946, they filed a motion for additional findings. I submit that properly we may ask that that motion be disregarded at such a late date, and we do urge that none of it be granted.

As to the particular things sought I will not speak until I have heard more of what is to be said in support of the [fol. 5049] motion. I do not, however postpone this part:

This is a motion not only as to findings, but to add to the judgment additional features. And one of the features is that without one slightest showing that we are going to commit any contempt of any judgment that this court enters, without the slightest showing of any probable cause, it is asked of your Honor that you issue what amounts to a warrant for search of our papers—no limit, no showing that something has happened that ought to be investigated; that you issue a warrant directing our employees to submit to cross-examination by Government's counsel, not in the presence of any Court or any Magistrate but—to be sure, I think they do consent that we might be present when they are cross-examined, but not that we might stop the cross-examination in any way.

That is what is seriously—I will say apparently seriously

—urged upon this Court by a counsel for the United States.

I said of the plan—and I say of this motion also—that it is a motion to accomplish a professional triumph and not a motion to accomplish a just result. Why, the very provisions of the Constitution of the United States would be [fol. 5050] violated by the issuance of any such roving commission to make an inquest into our affairs.

When, in 1942, there were reasons for it, a consent decree was entered—entered by consent—that investigation could be made, obviously designed to deal with the subject that was up, the disposal of certain theatres which we had agreed to. We consented that such an order might be entered. What was agreed to at that time has no bearing on what should be issued or could be issued by a court under the Constitution in the absence of such an agreement.

Mr. Wright: If the Court please, I think it is necessary to make a preliminary statement here, to go back over the things that were done prior to the entry of this judgment that is under attack by the defendants' motion.

As your Honor will recall, prior to the conclusion of the case, elaborate briefs were filed by both sides. We filed a main brief; they filed a main brief. We filed a reply; they filed a reply. And in those briefs we outlined proposed findings of fact, conclusions of law, that we thought the Court should adopt. They also submitted elaborate findings [fol. 5051] of fact and conclusions of law.

Then your Honor had those under study for, I believe, ten or eleven months, and when the decision came, it came in the form of an opinion, which did not follow either our findings and conclusions or theirs, and your Honor suggested the submission of new findings in accordance with the opinion, and so, what was done, was that the literal language of the opinion was taken and put in finding and conclusion form and submitted as the Court's findings and judgment, after omitting, of course, such recitals in the opinion as to what had occurred during the course of the trial, rulings on evidence, and so forth, which obviously had no proper place in the findings.

Then at that time—of course, that brought the ten-day period provided by Rule 52-(b) into operation, in which any one can move to amend, and that time, I think, was extended for both parties once and for us, I believe, twice, with the result that their motion was filed first, some time in December; ours wasn't filed until February, inasmuch

as we were engaged in the trial of the other case in New York, prior to that time.

Now, instead of filing what we had assumed would be [fol. 5052] filed, and what they got an extension of time for the privilege of filing, that is, a motion to amend the judgment in accordance with Rule 52-(b), what they filed, in effect, was a motion to vacate the judgment and enter a judgment of dismissal, a motion which virtually asked for a rehearing, which could only be had under Rule 59 of the Procedure.

Now it is perfectly obvious, by comparing those rules, that the only relief available under 52-(b) is an amendment of the findings and conclusions in a manner that is consistent with the decision of the Court, and it is evident from the face of Mr. McClennen's motion and his argument, that that is not the purpose or effect of his motion at all.

Now if the losing party wants to overturn a decision and secure a judgment on his findings, in his favor, he must either appeal or else he must file a motion to vacate or for rehearing. There is a case, Matyas vs. Feddish, decided in the District Court, Middle District of Pennsylvania, May 12th, 1945, in which the losing party claimed that under Rule 52 (b) he could ask the Court to amend its findings in a manner which would amount to a reversal of the judgment. [fol. 5053] In disposing of this contention the Court said:

"The purpose of Rule 52 is to clarify matters for the Appellate Court's better understanding of the basis of the decision of the trial court. Tulsa City Line v. Mains, 10 Cir., 107 F. 2nd 377. The Rule permits the Court in its discretion to 'amend' findings of fact or to 'make additional findings,' thus amplifying and expanding the facts. The Rule does not provide for a reversal of the judgment or for a denial of the facts as found, which is what the plaintiff requests at present." Which is what the defendants in this suit, of course, are requesting.

The Court: That would apply to only part of this motion?

Mr. Wright: Why, his entire motion is under Rule 52 (b).

The Court: Yes, but I say that that Rule, what you have said, wouldn't apply to those parts which are applications to amend the findings.

Mr. Wright: Well, in a large part, the so-called amend-

ments are simply the substitution of the findings which he asked for in his brief and didn't get, because of what the Court found.

The Court: You mean in so far as they contradict the language of the opinion?

[fol. 5054] Mr. Wright: Where they contradict the decision. But even where they don't contradict the language of the opinion, it is simply a narrative statement which is calculated to support a judgment of dismissal.

The Court: Well, I mean they have the same purpose you have here, at least, to add some light in instances where they are within the meaning of the opinion.

Mr. Wright: Yes, any amendment consistent with the opinion, there is no question as to that. To the extent that amendments offered are consistent with the decision, of course, they might properly be considered.

But I am merely pointing out that it is apparent from his argument and motion that that is not the purpose of the motion at all. There is no attempt here to clarify or to bring to the Court's attention any errors or matters which might have been overlooked.

As an example, he is apparently careful to re-incorporate in these proposed findings an inadvertent error in the findings as made as to the number of theatres that Schine operates.

The Court, I believe, originally found that Schine operated 93 theatres in 73 towns, which was evidently computed, I think, by adding up the list of theatres in the defendants' [fol. 5055] brief in which he said certain improvements were made.

Well, actually it appears later on in his own proposed findings here that Schine had acquired 150-odd, so that the 150 theatre figure would be correct instead of 93, as to which no effort has been made to change, obviously because that isn't the kind of a change that would add a finding in the defendants' favor.

Now, I cite that merely as an illustration to show that there hasn't been any effort here to get at the facts and to get you to make the decision or findings as they now exist a more accurate or better statement of the facts than you have now. The effort is simply an effort to have you adopt an argumentative narrative statement of the evidence which fits in with the claims made in the defendants' brief.

Now, another matter which was not, of course, suggested in his brief, was that it is now proposed for the first time to find that the Schines don't control the Schine Chain Theatres, Inc., and don't own stock in it. Of course, it appeared, and there was no dispute at the time of the trial but what the Schines dominated the corporation, and [fol. 5056] the interrogatory answers show, I believe, that the majority of the common stock is held by Schine Theatrical Co., Inc., a personal holding company. But the effort is now made in the form of this finding to make it appear that the Schines don't control these corporations. Well, now, it is wholly immaterial whether they have that stock themselves or whether it is held by Schine Theatrical Co., Inc., but I merely point out that these proposed findings don't in any way represent an effort to get a correct statement of the facts into the record but are only for argumentative purposes.

Now the real question in the consideration of these findings involves, I think, the question of what the purpose of findings is. Counsel's notion of findings evidently is that they are supposed to be a narrative statement of the evidence. Now, that is a view which the Courts I do not believe entertain.

A narrative statement of the evidence and the events that occurred in a trial is a clerical function, or at most, a lawyer's function in presenting an appeal. The purpose of findings, the only legitimate purpose, is to show the facts that the Court regarded as significant, and which control [fol. 5057] his decision.

And in setting out those facts, and in making those findings, the Court necessarily draws certain conclusions as to what certain evidence and certain facts show or do not show, and his findings, the findings of fact, necessarily take a conclusory form, because the findings of fact are, and should be, conclusions—not mere recitals of evidence from which those conclusions are drawn.

Counsel recognized that at the time his findings were submitted. I just quote from page 602 of his brief, asking the Court to make findings, Paragraph 15: "Schine has not monopolized or restrained the flow of motion pictures from any other state into any town", and so forth.

No. 18, "It has been but normal practice, and not predatory——"

Of course, to the suggestion that the word "predatory" came from the plaintiff's brief rather than from theirs is a simple answer: What the objection is, is that the Court found there were predatory practices instead of finding that there were not predatory practices.

Now, nothing, it seems to me, is to be gained by any discussion of form or elaboration of form of that sort. [fol. 5058] We, in our brief, submitted a shorter, more conclusory, form of findings than the Court adopted. It seems to me the Court took a middle course between the very elaborate findings in the Crescent case, and the simpler and more general ones which we submitted. But in any event, there is no obligation, whatsoever, on the Court at this time to reconsider all of this material that was offered at length to the Court before merely to try to accommodate the defendants' notions as to what kind of findings would help him most in the event of an appeal and most effectively present his theory of the case.

He has the entire evidence at his disposal, and there is no obligation whatsoever on the part of the Court to repeat in finding form facts which are otherwise in the record simply because he says he thinks his argument would be made more convenient by that procedure.

Now, even if your Honor treated this motion that is made ostensibly pursuant to Rule 52 (b) here as a motion for rehearing, that wouldn't open the door for re-examination of the matters that he seeks to open here, as stated under Rule 59, which says:

[fol. 5059] "In an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States."

That is the grounds on which he would be entitled to rehearing, which was the basis for rehearing prior to the adoption of the new rules.

Now, in commenting on that provision, Section 5902, at page 3247, Volume III, says:

"Just as in new trial at law, a rehearing would not lie merely to relitigate old matter."

Now, this motion really contains no new matter, or the kind of matter which would properly be subject of a motion for a rehearing, and raises no new point at all or no new

argument not previously made, and the Courts, of course, have not been disposed to rehear these cases indefinitely.

I would like to quote what the District Court for the Northern District of Illinois said in Stewart-Warner Corporation vs. Levally, 16 Fed. Supp., at pages 778 and 779, in disposing of a motion for rehearing in an equity suit in a patent case.

It says: "Defendants' first premise is the alleged discovery of additional material evidence; its second, alleged [fol. 5060] error by the Court in its findings, conclusions and decree. Defendants' action in the latter respect is equivalent merely to an attempt to reargue issues previously determined, after a voluminous record had been made and full and complete briefs and arguments submitted. Such practice is not to be encouraged, for, if a Court has once rendered its best efforts to arrive at proper solution of questions submitted, upon complete presentation, it should not be subjected to a demand to consider the same again. Otherwise, litigation would never end; 'suits would become immortal, and the decision be postponed indefinitely.'"

The Court's language there is equally applicable here. We had a decision in this case last October, and the time has come, I think, when there should be a final judgment, and in order to get a final judgment which will dispose of the matters at issue, it is necessary, of course, not only to dispose of these pending motions and amended findings, but also to fix a time and plan of re-organization which will carry out Section III of the Court's judgment.

Now, the defendants, of course, simply refused the invitation extended by your Honor's opinion to attempt to [fol. 5061] reach any agreement at all as to a plan which would carry out the judgment. Their position has been simply that they have not, and do not, propose to file any plan whatever, that we cannot have any plan of dissolution or re-organization, such as the court decreed.

We filed a plan last week, or we sent one up here, and sent it at the same time to counsel for the defendants, which they apparently received at the end of the week, but which apparently didn't reach your Honor. I saw Mr. Grobe in the hall this morning. He had it, and he said it came in Saturday.

The Court: I see.

Mr. Wright: We did submit this plan with a memorandum in support, which complies with the general theory of

your opinion—and, contrary to what Mr. McClennen tells you about it, the purpose of the plan is to keep Schine as a competitive factor in every situation that we can.

The main purpose of the plan is to put competition in all of the closed situations. The plan contemplates leaving the defendant with a very substantial circuit of theatres, one in which they have opposition in all possible localities, [fol. 5062] instead of the existing situation where you have this extensive link-up of closed towns.

I don't want to go into it at length here, because under the Court's prior order they are entitled to thirty days in which to file objections to the plan, and then presumably your Honor will have a hearing at which the plan and objections will be considered, and the judgment will incorporate whatever plan that your Honor sees fit to impose. And it seems to me that that is the phase of the case on which the Court may most profitably spend its time now in order to get a final judgment, and we would like to ask to have a hearing set before we leave here today at which that question of the execution of the plan may be gone into.

Now, as to our motion: We filed a memorandum in support—I don't know whether your Honor has read it or not—and I am perfectly willing to submit it on that.

I might just say, in passing, that in so far as this books and records clause is concerned, which counsel laid great stress on as a violation of the defendants' constitutional rights, among other things, it is one which has appeared in every decree, either litigated or by consent, that we have [fol. 5063] entered in the last three or four cases here either in this or a somewhat modified form.

These same provisions were before the Supreme Court in the Bausch & Lomb case, which was decided, I think, the term before last.

(At the conclusion of the proceeding Mr. Wright requested the following citation be inserted in the record: U. S. vs. Bausch & Lomb Optical Co., 321, U. S. 707, pp. 725-728).

In that particular decree we had not only our standard books and records clause, such as you see here, but we had an additional provision requiring periodic reports from the defendants, and the Court, in considering the provision, held that we were not entitled to have the provision requiring reports, but the rest of the provisions are the same as those

that you have here, and they received the approval of the Court at that time, so that you are not dealing here with anything that has been conceived of by the plaintiff in this case.

As counsel pointed out, a similar provision was in the consent order here in 1942, and, as I say, has been in all of our judgments in this period of time.

The Court: You don't specify any particular period of [fol. 5064] time — disclose whether or not a violation had occurred.

The only purpose of a provision of this character is to eliminate in advance any dispute as to access to relevant material of that kind. There is nothing, as I say, in the provision that hasn't been used in all of our consent and litigated decrees in the last three or four years, and it has been approved by the Supreme Court itself, so I don't think it is a matter which really raises any substantial controversy at all.

The other provisions, the other changes we suggested in the judgment are merely the incorporation of prohibitions against franchises, which are similar to the ones that were in the consent order.

Contrary to what counsel has told you, the franchise clause still is a proper one. There are no prohibitions against it today. Three of the major defendants are not even parties to the consent decree, and it is just as appropriate now to have a clause prohibiting franchises as it was in 1942. The consent order contained the same prohibitions.

As to the admission price material that we propose to add, we feel that it was necessary for clarity. We didn't think that the single paragraph that was devoted to the question [fol. 5065] in the opinion made the Court's position sufficiently clear on that point, and we also thought there should be a corresponding injunctive provision.

All of those matters, as I say, have been dealt with in our memorandum and I am perfectly willing to submit them on the memorandum.

There is another matter I want to call your attention to before I stop, and that is the gross misrepresentation by Mr. McClennen of what was said in New York. Now, I don't know whether your Honor paid any attention to that —I don't suppose you should—but if you do want to concern yourself with what the argument was in the Paramount case,

and what each one said, the entire argument was printed up, and I would be very glad to supply you with a copy.

But I don't want your Honor to get the impression here that what was said by Mr. McClennen is all of what happened there. That is of no significance, in any event, but if you do want an accurate record, I would be glad to supply it.

The Court: Well, on this subject of access to the books, and so on, wouldn't it be better to place a provision in this judgment that the parties abide by the decision of the Court [fol. 5066] whenever there is disagreement between them concerning such access?

Mr. Wright: Well, of course, the normal course would be a contempt proceeding, that is, before there could be any action against the defendants.

The Court: Well, I mean, you would simply have to put up to the Court the reason for your request. That is the point.

Mr. Wright: Well, obviously, there is no way of compelling compliance. What I mean is all they have to do is say "No, get out of here——"

The Court: I know, but on the other hand, I take it that it is a sequence, something to be followed out in support of the judgment, in that you could apply to the Court in the event that your request was refused, instead of applying to the Court in the first instance.

Mr. Wright: Yes. It seems to me in practice you would come out the same way. If they have anything they don't want to show you, or if they don't want to let you see the books or talk to their people, then we can't make them do it. We would have to come into court and get an order under any scheme.

The Court: Well, I don't see how you could judge them in contempt without coming into court, and, correspond-[fol. 5067] ingly, I would say you could make application to the Court when necessary.

Mr. Wright: Well, that particular provision has no particular substance, as far as we are concerned. The only reason I offer it is because it has been habitual in all the judgments we have offered. I have no interest in sustaining it, or not. I can submit it to your Honor on that basis.

The Court: Well, now, I suppose the thing we are confronted with is the order of procedure in the future. I mean by that this: The question of whether the case goes up

prior to any action on the plan, or whether the plan is considered, some plan is adopted by the Court and approved by the Court. It seems to me that is the main thing we ought to consider here now.

Mr. Wright: Yes. What counsel is suggesting, if I understand him correctly, is a double appeal, spread out over the longest possible interval.

As I understand it, what he wants to do now is appeal from the judgment as entered with the provision that there shall be a plan in it, a concrete plan; and then, presumably, he would have a second appeal from such plan as actually was put into effect.

[fol. 5068] Of course, that is a great convenience to the defendants, but I don't think the burden that that would impose, both on this Court and the other Courts, should be imposed. I think we should get a final order entered here so that the whole thing may be heard in the Supreme Court at one time, and then we can get a final disposition over-all. He suggests that we get no final disposition in the Supreme Court or at the next hearing down here.

The Court: Why isn't that so, Mr. McClennen? Why should we be required to take two appeals?

Mr. McClennen: Well, I see no reason to think there would be a second appeal. When we have the Supreme Court's statement as to what we must do, then we will be able to proceed.

The Court: Why, the Supreme Court will either sustain or not sustain the decision of this Court, and it seems to me that if they sustain, it leaves us in a position here to go on and then later take action on the plan, and if that plan isn't approved by you, why, you, appeal again.

Mr. McClennen: Well, it is my position that if the Supreme Court did not decide the fundamental things that I spoke of but held that we must dispose of theatres, the Supreme Court would indicate whether or not the other [fol. 5069] thing that I spoke of, that is, whether we must dispose of theatres that we got originally properly without any restraint of trade or not.

If the Supreme Court says we must dispose of the theatre in Gloversville, for instance, why then, we can move forward with the plan for that purpose.

The Court: But the Supreme Court isn't going to speak on that subject in the first instance unless a plan has been proposed. I am just arguing it.

Mr. McClennen: From the way the Supreme Court has acted in the past, I shall be very much surprised if the Supreme Court did not deal with that bald proposition, that is, whether we must dispose of theatres that we have acquired properly.

The Court: You think they would decide that on this appeal or wouldn't?

Mr. McClennen: I think they would on this appeal. When a decree has been entered that says there will be a dissolution, re-alignment, or re-organization such as to produce competition, we appeal from that apart from the fundamental question as to whether there should be any decree against us, we appeal from that, and that presents to the Court the question of whether there is to be a dissolution [fol. 5070] or realignment that will take away from us theatres obtained properly originally.

The Court: Wouldn't they be likely to say that there should be a distribution or re-alignment and then send it back to the Court to effect such a distribution or re-alignment?

Mr. McClennen: I should expect that they would not fail to deal with that very fundamental question of whether we must give up theatres that were obtained properly originally.

The Court: I should think ordinarily there would have to be a re-alignment in the first instance, approved by the trial court, and then you would have to start with that.

Mr. McClennen: If your Honor please, before the remark gets cold that I had made a gross misrepresentation to the Court of what Judge Hand said. I am going to read to you just what he did say.

Mr. Wright: Of course, I object to carrying into this record any single statement made by the Court in another argument. If your Honor wishes to read this entire volume, I have no objection. But I do object to him seizing a single statement in the course of another argument and inserting it in the record here.

[fol. 5071] Mr. McClennen: When I am charged, your Honor, not only with having made a mis-statement, but a gross mis-statement, I urge that I should be permitted to read to your Honor the language which I paraphrased to see whether it was a misrepresentation.

The Court: I don't think that what was said here has very much bearing on the situation, and I don't think counsel intended to state that you didn't correctly state what was said by the Judge in that case.

Mr. McClennen: He said that I made a gross misstatement.

Mr. Wright: My objection is that the effect is misleading of simply picking out any statement made by a Judge in an argument and then asking your Honor to consider that as a comment on what is being said here.

Mr. McClennen: That isn't what he said. He said I made a gross mis-statement of what Judge Hand said. I urge upon your Honor that I be permitted to read what Judge Hand said.

The Court: I thought what he said was that the whole statement taken together was misleading.

Mr. McClennen: What he said was that a gross misstatement was made by me.

Mr. Wright: I take it you have no objection to leaving that volume with the Court?

Mr. McClennen: I have no objection to leaving the volume [fol. 5072] with the Court to have him see all that the Court said. And this is the statement:

"Judge Hand: Why do you have to sell theatres in order to cure that, if there is a wrong there?

Mr. Wright: Well, the agreement is, I would say, per se illegal, and of course——

Judge Hand: You seem really to aim at, I won't say nothing, because you are calling attention now to other wrongs, but your great aim is to upset all the ownership of theatres. Now that is an extremely drastic remedy that I should think was extremely likely for this court to give. But that is merely a first impression by myself, and I have got to study this thing very carefully in other ways than just by reading through the briefs once, of course.

But this sort of thing that you are arguing now is the kind of thing that has always been argued, and remedies have constantly been granted that were thought sufficient. Maybe they have not been against the kind of thing you are calling our attention to here."

Now I do not urge upon your Honor these arguments contained in this volume. I had wanted to hand these arguments to you as a whole, but I doubted the propriety

[fol. 5073] of my doing so, because it would bring before your Honor things of which there is no evidence whatever in this case. But with those preliminary comments, since Mr. Wright wants it, I leave with you the printed argument in the case and ask your Honor——

Mr. Court: When was this case submitted?

Mr. Wright: It was submitted on January 18th, and I think there should be a decision very shortly.

Don't misunderstand me, your Honor. There is no obligation on your part, as I said, to examine the argument in another case at all. But I insist that the only fair way to go into it, if your Honor is going to pay any attention to what was said on an argument in regard to another case, that you would have to examine the entire contents of the argument. My statement was that there was no occasion for your Honor to examine the contents at all.

The Court: Well, whatever you gentlemen agree on. If you want to submit it to the Court, all right. If there is objection either way, why—I don't know what if any value it might have so far as the decision in this matter is concerned.

Mr. McClennen: Well, I have the volume here, and I as-[fol. 5074] sert that I have made no misrepresentation of anything that Judge Hand said in it, and the volume is available. If Mr. Wright wants your Honor to have it to see whether I have made any gross misrepresentation of anything that Judge Hand said, I leave that matter at that.

Now it is said as to the matter of the object of a motion to amend, and I refer to the decision of the Supreme Court in the Crescent case, on December 11, 1944, where the motion in that case was up, and the Court, by Judge Douglas said, "The motion to amend the findings.

If it was not addressed to mere matters of form, but raised questions of substance, that is, if it sought a reconsideration of certain basic findings of fact and the alteration of the conclusions of the Court, an examination of the motion makes plain that matters of substance were raised."

That is the Supreme Court's characterization of the object of the motion in that case.

Now, it is said that in all these cases—of course, I can't answer all these cases, because I don't know what they are

—that there has been these provisions for search of the [fol. 5075] defendants' records. I have here the final decree in the Crescent case as filed May 17, 1943, and the order of the District Court, after the appeal was out of the way, entered February 19, 1945, and I find in my copy of it no provision for any such examination of the records of the Crescent Company.

The Court: What do you say to the Court's suggestion in that connection?

Mr. McClennen: For examination of the records?

The Court: That isn't an ordinary way of handling it.

Mr. McClennen: Well, any such thing wasn't put into the decree in the Crescent case.

The Court: Well, that might be very true, but I am saying why wouldn't that be the proper way to handle it here?

Mr. McClennen: Because I say that it would violate the Constitution. *We are entitled to be free from unreasonable searches*, and a search is unreasonable unless it is shown that there is probable cause to believe that there has been a violation of the injunction.

The Court: Well, that would be avoided by the procedure I have suggested. Let application be made to the Court, the Court passes on it right then.

Mr. McClennen: That is not the proposal in this case.

[fol. 5076] The Court: I understand. That is my proposal.

Mr. McClennen: I submit that there should be no provision in the decree for an examination of our records until there is presented to your Honor reasonable cause to believe that there has been a violation of the injunction, and then the matter is presented, and that there should be no investigation of our records until that time.

As I say, this case that has been so much relied on has no provision for such an examination, and I cite this to your Honor because of the assertion here that in all these cases this was a provision that had been put in. That is the reason that I am calling your attention to one that I happen to have handled, knowing not what the others are which he has referred to.

The Court: Well, I cannot see the necessity for putting it in anyway. Application can be made to the Court at any time, and the Court can pass upon it then.

Mr. McClennen: Well, that would be true of any decree, the ordinary decree that is entered. The plaintiff can come

into court and say there is reasonable cause to believe that this decree has been violated and we ask an opportunity to see the records to see whether that is so, and then if there [fol. 5077] is a showing, reasonable cause to believe that there is such a violation, then such an order may be entered.

But there is no occasion for it in advance in a decree because it is a matter that relates to a subsequent contempt proceeding, if there is grounds for such a proceeding.

Now, if your Honor please, it is suggested that what we are asking for is a narrative of the evidence. Well, in this very motion to amend which the plaintiffs present, they ask for a more elaborate narrative of the facts because they think your statement is too inadequate for the plaintiff's purposes, that is, the principle for which they contend is, "Don't narrate the evidence, except where it is favorable to the plaintiff. Don't put in any evidence on which a judgment of dissolution is to be based which is favorable to the defendants."

That is the summary of their position in this matter.

The Court: Well, they claim that these proposed statements of theirs come within the decision of the Court, while their claim is, on the other hand, that your proposed findings are in contradiction of the decision of the Court.

Mr. McClennen: Then I say that statement is not so. In [fol. 5078] many of these cases where they have made a simple statement, where their draft of findings said we made a threat, for instance, we have substituted a statement of just what we did do. That is all.

Now, why should the representatives of the Government desire to keep their own facts out of the findings of fact, on which so serious a judgment is to be entered? What reason for such a position? We ask to have a fair narrative of the facts put into the findings, so that it can be tested whether on that state of facts we are called upon to have wrested from us these great numbers of theatres.

We are charged with making no attempt to clarify. Clarify? When we have laid out exactly what was said, so as to make it perfectly clear what was said. Absolutely no basis for any such assertion.

No effort to get at the facts, it is said of our motion. Why, what a monstrous statement, your Honor, when we are laying before you the facts exactly as the evidence introduced for the plaintiff showed those facts to be.

Then there is this statement that there is an effort made to make it appear that Schine is not in control. And that [fol. 5079] is said on the very afternoon that I have argued that Schine was the policy maker for this corporation; that he was the one that designed the course that that corporation was to pursue. Of course, there has been no effort whatever to suppress the fact that J. Myer Schine was the controlling head of this corporation, and the only controlling head. But your Honor had findings of fact as to the stockholdings that simply were not so that had been laid before you by plaintiff's counsel, and if they are all stricken out, all right. But if they go in, they should go in as the fact is, and that is simply the reason why the fact is stated in the motion.

Now, there was the statement at the outset that there had been an agreed extension of time to file a motion, which they spoke of as being a motion under 52 (b). Well, we filed this motion before there was any extension of time; we filed this motion within ten days of the judgment, and filed at that time the things that we ask for in this motion. There was no occasion for their having any supposition as to what was going to be filed pursuant to the extension of time, because it had already been filed before anything was [fol. 5080] extended so far as time was concerned. Now, if your Honor please, his specific——

The Court: Counsel stated that you made first an application for extension of time.

Mr. McClennen: Well, the first application for extension of time was at the request of the Government's counsel. The plaintiffs asked for two months' extension. We had already filed our motion, and we joined in that two months' extension provision.

The Court: Well, what I had in mind that counsel said there is that the first application was made by you. You said this motion was filed in ten days. Now, his statement is to the contrary, that you made an application for extension of time to file.

Mr. McClennen: We had filed the motion that is before you before there was any extension of time.

Mr. McKay: The first extension was filed at the same time.

Mr. Wright: It was by agreement. I have the order here. It was made on November 8th, and it is within that extended time that the defendants' motion was filed.

Mr. McClennen: Our motion was filed, Mr. Wright, without any extension of time. It was filed on the 10th day of November.

Mr. Wright: The only thing I have in the file is the order of November 8th.

[fol. 5081] Mr. McClennen: Well, the United States Attorney's endorsement of the service shows that he received our motion on November 10th, 1945.

Mr. Wright: Well, I assume that is when it was filed.

The Court: The point then, counsel, is why did he have to join in the consent?

Mr. McClennen: The Government wanted more time.

The Court: I understand that. Why did you have to join?

Mr. McClennen: There was no need for time as far as we were concerned. We had filed ours. Now, it ought not be necessary that we should clear that up. We filed our motion before that consent. We filed it in time.

The Court: I don't think that makes very much difference here. The reason I spoke about it was that there was an apparent discrepancy in your statements.

Now, you said, Mr. Wright, you want some date fixed for a hearing on the proposed plan?

Mr. Wright: That is what the order calls for, the filing of objections by them and then a date for hearing on the objections. You have thirty days from whenever it was received. I don't know when you received the plan.

Mr. McClennen: I got the plan on the morning of February 22nd, 1945 at my house.

[fol. 5082] The Court: Well, I haven't seen it. What dates do you want to fix then?

Mr. Wright: Well, I would assume that their objections would be filed by March 22nd, and I would suppose that we could have it set down for the first week in April.

Mr. McClennen: Of course, it is very trifling, but I think March 24th would be the expiration of thirty days, and then whatever time is a convenient time thereafter I should think would be satisfactory.

The Court: Well, the 24th of March is a Sunday. Monday is the 25th. How long a time do you want after that? It is immaterial to me.

Is it your view, Mr. McClennen, that your time to appeal will date from—you have already served notice of appeal—but I mean is it your contention that irrespective

of that you have the right to take an appeal in thirty days after the action on the findings?

Mr. McClennen: Sixty days. I infer that that is the view of the Supreme Court, that is, they had just that situation in the other case, the appeal was taken, and then another one was taken, and they dismissed the first one as premature, and went on with the second one.

[fol. 5083] The Court: I assume that that will have to be done here. I was just thinking from your standpoint of the question of time, that is all. What time do you want to come up here in April? You can fix your own date, so far as I am concerned.

Mr. McClennen: Am I right in assuming that it would be preferable to your Honor that it should be on a Monday?

The Court: I don't think that makes much difference.

Mr. McClennen: I would rather have it some other day. If your Honor will fix any Tuesday in April.

The Court: Is the 9th agreeable?

Mr. McClennen: Mr. McKay suggests the 16th rather than the 9th.

The Court: 16th is all right.

Mr. McClennen: I have two briefs, one in opposition of their motion, that is dated February 23, 1946, and one in support of our motion, dated February 5, 1946, and I hand Mr. Wright a copy.

Mr. Wright: I haven't any formal memorandum of those authorities I mentioned today. If your Honor wants them I would have a list typed and leave them with you.

The Court: All right.

(Whereupon an adjournment was taken until April 16th, 1946.)

[fol. 5084] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

Civil No. 223

UNITED STATES OF AMERICA, Plaintiff,

v.

SCHINE CHAIN THEATRES, INC., et al., Defendants

Appearances:

Robert L. Wright, Louis B. Schwartz, Special Assistants to the Attorney-General; Wendell Berge, Assistant Attorney-General; George L. Grobe, United States Attorney; for Plaintiff.

Edward F. McClennen, Samuel S. Isseks, Willard S. McKay, for the Defendants.

DECISION OF JUDGE KNIGHT ON MOTIONS TO AMEND FINDINGS, CONCLUSIONS, AND JUDGMENT

KNIGHT, District Judge:

Both parties have moved under Rule 52(b) of the Federal Rules of Civil Procedure to amend the Findings of Fact and Conclusions of Law and the Judgment heretofore filed herein.

The Findings made by the court follow closely the opinion. It is usually the practice of this court to ask the prevailing party to submit Findings. No need has been seen for asking an unsuccessful party to submit Findings. The latter has the opportunity to present the record on appeal.

The amendments proposed by the defendants set out in detail large portions of the testimony. Many of these also contain conclusions contrary to the Findings made. [fol. 5085] It is believed that the Findings and Judgment as made are sufficient. It is not the duty of the court to set out the details of the testimony as proposed.

The question has been raised that the relief sought by the defendants is grantable only by motion under Rule 59 and not under Rule 52(b). It is true that the granting of defendants' motion in toto would amount to a reversal of the Judgment. In view of the action herein taken, it seems unnecessary to determine this question. Irrespective, how-

ever, of any obligation of the court so to do, certain amendments are allowed.

DEFENDANTS' PROPOSED FINDINGS

Proposed Finding No. 1—Allowed—

"Among the theatres in which Schine became financially interested there are 25 theatres situated respectively in 16 towns, Auburn, Bath, Canandaigua, Carthage, Corning, Gloversville, Herkimer, Little Falls, Newark, Norwich, Oneonta, Oswego, Salamanca, Saranac Lake, Syracuse and Watertown, New York, which had belonged to Schine before 1930 and had been leased to the Fox-Metropolitan Circuit in 1929, and which reverted to Schine in 1933 as a consequence of the termination of the leases in the Fox-Metropolitan bankruptcy proceedings. The result of this reversion was that it was necessary for Schine to resume the operation of the said theatres. At the end of the year 1930 Schine had no motion picture theatres, except suburban theatres in Buffalo and Rochester, motion picture theatres in Courtland, East Rochester, Fairport, Rockport, Geneva, Malone, Medina and Ogdensburg, and a half interest in Amsterdam and a theatre under construction in Bellefontaine, Ohio."

and to be added to Finding No. 3 as found and not substituted therefor. The remainder of the proposed Finding is disallowed.

[fol.5086] Proposed Finding No. 2—Allowed—

"Schine has expended for the cost of land and buildings acquired by it the sum of $6,509,100.00 and for the cost of building additions and improvements the sum of $4,439,000.00."

and to be added to Finding No. 4 as found and not substituted therefor. The remainder of the proposed Finding is disallowed.

Proposed Finding No. 3—Disallowed.

Proposed Finding No. 4—Disallowed.

Proposed Finding No. 5—Allowed—

"Schine acquired by purchase or lease 55 theatres from 1922 to 1931 and 80 from 1936 to 1941, inclusive,

15 in 1938 and 15 in 1939. The 55 theatres included the 25 which, as above stated, had been acquired by Schine and sold or leased to Fox-Metropolitan and which reverted to Schine in 1933 in the Fox-Metropolitan bankruptcy proceedings."

and to be added to Finding No. 7 as found. The remainder of the proposed Finding is disallowed.

Proposed Finding No. 6 to No. 14, inclusive,—Disallowed.

Proposed Finding No. 15—Allowed and to be added to Finding of Fact No. 20, but not in substitution therefor.

Proposed Finding No. 16—Allowed and to be added to Finding of Fact No. 21, and not to be substituted therefor.

Proposed Finding No. 17—Disallowed.

Proposed Finding No. 18—Disallowed.

Proposed Finding No. 19—Disallowed.

Proposed Finding No. 20—Allowed.

[fol. 5087] Proposed Finding No. 21 to No. 26, inclusive,—Disallowed.

Proposed Finding No. 27 to No. 31, inclusive,—Disallowed.

Proposed Finding No. 32—Allowed, except that the record shows approximately 87% are located in cities and villages.

Proposed Finding No. 33 to 44, inclusive,—Disallowed.

Proposed Finding No. 45—Allowed, except that "or 40" percent should be stricken.

Proposed Finding No. 46 to No. 84, inclusive,—Disallowed.

CONCLUSIONS OF LAW

V-1-9, inclusive, Denied.
VI—Denied.
VII—Denied.

PLAINTIFF'S PROPOSED FINDINGS

1. Add at the end of Finding No. 22 the following:

"Minimum admission prices were omitted from Schine's contracts, although the contracts of his independent competitors specified minimum admission prices.

"The Plaza contracts in evidence prohibited it from charging less than 15 cents. The Fox contracts for the 1933-34 season permitted Schine's State Theatre with a 60-day clearance over the Plaza, to charge an adult evening orchestra admission price five cents lower than the Plaza was required to charge. Metro's 1933-34 contract for Schine's State Theatre omitted any minimum admission price requirement, as did the Universal contract for the State and RKO contracts for the Fox and State Theatres in both the 1933-34 and 1934-35 contracts.

[fol. 5088] "In Lexington, Kentucky, Schine's contract with Fox for the 1936-37 first run product provided for minimum admission prices in Schine's Lexington Theatre for the first run showing of Fox pictures. Schine cut its admission price below the minimum prices fixed. Schwartz complained to Fox and Paramount about these. Fox advised Schine of this complaint and Myer Schine replied that the cuts were 'quite essential and proved to be beneficial.' Fox then omitted all minimum admission price requirements in the Schine second and third run contracts for the succeeding seasons, but provided for minimum evening adult admission prices of 15 cents for the independent theatre."

In other respects the proposed finding is disallowed.

2. Disallowed.

Nos. 3 to 7, inclusive, Allowed. It seems to me that the proposed amendments are reasonably based on the opinion herein.

8. It is believed that the court should not at this time include any Finding with respect to authorizing representatives of the Department of Justice to have access to books, etc. of a defendant corporation and to interview officers of

a defendant corporation. It is believed that the court has the authority to make this direction. (United States v. Bausch & Lomb, 321 U. S. 707) A plan of reorganization of the defendants or re-alignment of the theatres in suit has been submitted by the plaintiff and action on it is pending. We see no reason why the matter proposed in No. 8, *supra*, should not await consideration of the plan or some further action relative to the judgment.

March 8, 1946.

John Knight, United States District Judge.

[fol. 5089] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

CERTIFICATE OF CLERK

STATE OF NEW YORK,
City of Buffalo,
County of Erie, ss:

I, May C. Sickmon, Clerk of the United States District Court for the Western District of New York, do Hereby Certify that Plaintiff's proposed amended Findings of the Court and amended Judgment submitted to the Court shortly prior to March 29, 1946, referred to as Item 10 of Defendant's supplemental praecipe, are the same amended Findings of the Court and amended Judgment as those forwarded as Items 15 and 16 of Defendant's praecipe dated April 16, 1946.

In Witness Whereof I have hereunto set my hand and the seal of this Court this 2nd day of July, 1946.

May C. Sickmon.

Subscribed and sworn to before me this 2nd day of July, 1946. Margaret E. Baysor, Notary Public, Niagara County. Certificate filed in Erie Co., N. Y.

[fol. 5090] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

CERTIFICATE OF CLERK

STATE OF NEW YORK,
City of Buffalo,
County of Erie, ss:

I, May C. Sickmon, Clerk of the United States District Court for the Western District of New York, do Hereby Certify that no Notice of Settlement of the Amended Findings of the Court and Amended Judgment submitted by the Plaintiff to the District Court on or about the 29th day of March, 1946 was filed by the Plaintiff in the District Court.

In Witness Whereof I have hereunto set my hand and the seal of this Court this 2nd day of July, 1946.

May C. Sickmon.

Subscribed and sworn to before me this 2nd day of July, 1946. Margaret E. Baysor, Notary Public, Niagara County. Certificate filed in Erie Co., N. Y.

[fol. 5091] IN UNITED STATES DISTRICT COURT

[Title omitted]

Amended Findings of the Court—March 29, 1946

FINDINGS OF FACT

1. The defendants in this suit are: Schine Chain Theatres, Inc., a New York holding and service corporation, five other corporations in which Schine Chain Theatres, Inc. owns all of the stock, to wit, Schine Theatrical Co., Inc., an operating company, Schine-Lexington Corporation, a holding company, Schine Enterprise Corporation, a service corporation, Schine Circuit, Inc., a service corporation, and Chesapeake Theatre Corporation, a holding corporation; and also three individuals J. Meyer Schine, Louis Schine and John A. May. Hereinafter the corporate defendants will sometimes be referred to as "Schine", the "Schine Circuit" or as "the Circuit."

2. From 1920 to 1941 these defendants acquired, either as purchaser or as lessee, an interest in 175 theatres and in addition some 42 separate parcels of real estate for theatre purpose, or connected with such purpose.

3. Since 1931, there have been 118 theatre corporations in which an interest has been acquired by "Schine." Among the theatres in which Schine became financially interested there are 25 theatres situated respectively in 16 towns, [fol. 5092] Auburn, Bath, Canandaigua, Carthage, Corning, Gloversville, Herkimer, Little Falls, Newark, Norwich, Oneonta, Oswego, Salamanca, Saranac Lake, Syracuse and Watertown, New York, which had belonged to Schine before 1930 and had been leased to the Fox-Metropolitan Circuit in 1929, and which reverted to Schine in 1933 as a consequence of the termination of the leases in the Fox-Metropolitan bankruptcy proceedings. The result of this reversion was that it was necessary for Schine to resume the operation of the said theatres. At the end of the year 1930 Schine had no motion picture theatres, except suburban theatres in Buffalo and Rochester, motion picture theatres in Courtland, East Rochester, Fairport, Rockport, Geneva, Malone, Medina and Ogdensburg, and a half interest in Amsterdam, and a theatre under construction in Bellefontaine, Ohio. As of the time of the commencement of this suit there were 62 of such operating corporations and in 48 of these "Schine" owned 100 per cent of the stock, in 12, 50 per cent. Schine operates 93 theatres in 73 towns (including cities). The towns run generally in population from 5000 to 35000 and include 39 in New York, 16 in Ohio, 8 in Kentucky, 7 in Maryland, 2 in Delaware and 1 in Virginia. In addition to its theatrical and realty operations, "Schine" has booked and bought for and supervised 37 theatres since 1931, and when this suit was brought there were 27 for which it so acted. Since 1928 the closed towns (those in which there was no opposition) show a total increase of 56. In 1941 there were only 3 towns in which Schine's competitors (hereinafter called independents) were playing major film product.

4. In a single season, 1939-1940, Schine paid $1,647,000 to six film companies. These defendants together control the largest independent theatre circuit in the country. For [fol. 5093] theatre acquisitions and capital improvements there has been expended admittedly upwards of $10,948,100,

not including dividend payments on operating expenses and cash on hand. Schine has expended for the cost of land and buildings acquired by it the sum of $6,509,100 and for the cost of building additions and improvements the sum of $4,439,000.

5. There are eight so-called major film companies: Fox, Loew, Paramount, RKO, Warner, Columbia, Universal and United Artists, which supply Schine a large per cent of the feature films used by Schine and together receive upwards of 75 per cent of the total film rental paid by Schine. The principal sales office of each is in New York City and the method of licensing and servicing of films is similar with each except that United Artists licenses its films subject to the approval of the respective producers of whose films it distributes. The feature films are mostly produced in California where the negatives are taken, the prints being generally manufactured in New York and New Jersey. Film license applications are solicited by salesmen from the branch office, and the delivery and return of films are made through the branch. Prints of films are sent from the various exchange offices in the various states to the exhibitors of the main office and all contracts are subject to approval by the main office at New York although the recommendations for approval ordinar-ly are made by the branch manager who is close to the situation. Prior to the 1941-1942 season it was the usual custom for all of the distributors to make license agreements for feature films for a period of a year commencing about September of each year, which license agreements were ordinarily made before the film was produced. Since that season the films of Fox, Loew, Paramount, RKO and Warner have been [fol. 5094] licensed in blocks generally not exceeding five in number rather than in season blocks.

6. The individual defendants hold the principal offices in the defendant corporations and hold other offices in the various so-called local corporations. They are the principal stockholders in the parent corporation and have general supervision of the operations of the circuit. The film buying for the circuit and the companies in which it had an interest was conducted through "Schine" or one of its subsidiaries, Lazar, a regional manager for "Schine" covering several states, and Silverman and Hensler, district managers, and one Insley, principally carried on negotiations for

acquisitions, though the defendants Schine and May engaged directly in some, while one Lynch was "the Circuit's" chief film buyer. In circuit buying "Schine" generally negotiated deals with the division manager. The agreements so made are referred to as "master agreements and deal sheets", but these were usually followed by license agreements signed by the chief sales executive of the distributors.

7. The great film buying power of the defendant corporations gave opportunity to exert pressure on the distributors to obtain preferences. The extent of this film buying is demonstrated by the exceedingly large number of theatres controlled by "Schine" and the large amount of money which must have been paid for film rentals. This buying power included both closed and open towns. By combining the open and closed towns in Schine's deals with the distributors, Schine was enabled to dictate terms to the distributors. This ability to dictate terms was further increased by the authority of Schine to buy product for theatres not owned or operated by it. Schine acquired by purchase or lease 55 theatres from 1922 to 1931, and 80 from 1936 to [fol. 5095] 1941, inclusive, 15 in 1938 and 15 in 1939. The 55 theatres included the 25 which, as above stated, had been acquired by Schine and sold or leased to Fox-Metropolitan and which reverted to Schine in 1933 in the Fox-Metropolitan bankruptcy proceedings.

8. The means and methods employed by the different defendant corporations through their officers and authorized representatives to obtain a "monopolistic" control were numerous. Principally among these were arbitrarily depriving independents of first and second run pictures, securing unreasonable clearances, making threats to build or open closed theatres to prevent construction or operation by independents, lowering admission prices, obtaining rental concessions, restricting independents who sold to Schine as to periods and places of operation, making long time franchise agreements covering the "Circuit."

9. Some specific instances showing the predatory means used by "Schine" follow:

(a) The Schine defendants arbitrarily deprived independents of the first run product which they had previously enjoyed in several towns. Independents were deprived of

1936-37 Columbia product at Norwalk; 1935-36 Fox product at Van Wert and Bucyrus; Loew's product for 1930-31 at Bellefontaine and for 1935-36 at Van Wert; Paramount's 1935-36 product at Van Wert and Bucyrus; RKO product for 1933-34 at Auburn and 1935-36 at Norwalk; of United Artists 1936-37 at Norwalk; and of Warner for 1933-34 at Norwich, 1936-37 at Norwalk; and 1941-42 at Harlan. Independents were arbitrarily deprived of second run product which they had previously exhibited, losing 1938-39 Columbia at Rochester, Loew's 1935-36 at Van Wert and 1934-35 Warner at Watertown. After "Schine" secured the [fol. 5096] product from the independents for the aforementioned seasons, he retained it and the independent was unable to secure it in subsequent seasons. Relative to six towns including Corning, Lynch wrote on October 21, 1933, Metro: "If there are any other opposition towns where you believe you can sell a second run, I would appreciate it if you would take the matter up with me first before selling." In 1932 Lynch wrote Flynn a letter saying, among other things: "I want you to refrain from selling him (independent) any pictures whatsoever." And Metro through Flynn agreed not to do so. Lynch also wired Fox to withhold selling to this independent and wrote Fox' agent saying "have also asked him (Schmertz-Fox agent) to refrain from selling this man second run."

(b) "Schine" was able to secure unreasonable clearances year after year in many towns. A few only need to be mentioned. At Corning, New York, RKO permitted 90 to 180 days and Fox permitted 160 days. At Seneca Falls, New York, Columbia and United Artists permitted 120 days. At Little Falls, New York, RKO, Columbia and Universal permitted 120 days and United Artists permitted 115 days. At Carthage, RKO permitted 120 days and United Artists 90. United Artists permitted 90 days at Watertown, New York, and 90 days at Amsterdam, New York; Bucyrus, Kent, Norwalk, Tiffin and Fostoria, Ohio; and Lexington and Van Wert, Kentucky. Schine got clearance for Herkimer over Ilion where none existed before.

(c) The license contracts with "Schine" in many instances specified minimum admission prices for the various runs as well as clearance periods. This affects adversely the time given the competitor.

10. "Schine" made threats to build in various towns, such as Paris, where there was a sign up, Canandaigua by a [fol. 5097] sign and newpaper article published, and where he eventually did build. In Perry, a statement by May and a newspaper article announcing that land had been bought for theatre purposes came at a time when "Schine" was trying to purchase the independent's lease. "Schine" did not build, but later got the lease. In Salamanca, just after independents acquired a site for a contemplated theatre, through the press "Schine" announced its intention to build. In Medina, "Schine" announced the making of an agreement to erect a new theatre immediately after independents started construction. In Mount Vernon, May contacted the independent to buy, saying "Schine" would build unless the deal could be put through.

11. Defendants' authorized agents made statements to independents which are reasonably construed as threats.

(a) At Bellefontaine, during negotiations for the renewal of a lease with an independent, Lazar threatened to reopen the Opera House if the independent opened the Strand.

(b) With reference to Paris, Lazar told the independent, who was taking steps to build, that if the independent went ahead with his projects "Schine" would build a 1200 seat theatre in Lexington where the independent had a theatre and that the house would be run with 10¢ policy at all times. At Paris, Schine and an independent began construction at practically the same time. Lazar asked the independent to stop construction and see him about a deal. Subsequently Schine took over the independent's Lexington and Paris theatres under an agreement prohibiting for fifteen years the independent from engaging in the theatre business in any town in Kentucky where Schine had a theater.

(c) Just before Schine acquired the "Forum theatre in Norwalk, Lazar advised an independent to "get in with us [fol. 5098] • • • we are a big company. You know what it means if you are not in with us" and further stated: "If you lease your theatre Mr. William Selman (part owner of the "Forum") will walk out of town."

(d) At Van Wert, the operator of the "Ohio" theatre could not get first run product it had had. During negotia-

tions for the sale of the "Ohio" to Schine, Lazar said that Moore would have trouble getting product; Schine would have the first runs; and that Schine was interested in buying in order to raise prices.

(e) At Lockport, during negotiations with "Schine" for the "Palace" theatre, May said it would be necessary to re-open the Hi-Art owned by "Schine" to use up "the large volume of product they had bought." This statement evidently was made to induce Reliance to sell the "Palace." In this instance it is to be noted that the independents experience great difficulty in getting product. Hi-Art had then been closed for seven years. Metro, Fox, Universal and Loew's refused major product to the independent. Indicative of the attitude of the distributors is the letter from the Eastern Salesmanager of Loew's who wrote:

> "In our negotiations with the Schine interests it will very likely be that we will have to give them consideration for our product at Lockport, as well as other situations, and as we are hardly in a position to forego or jeopardize the business from their other situations, and for the further reason that they have for a number of years been a very representative account, we feel that our interests would be best served by giving them such consideration."

(f) At Perry, May told the independent that "Schine" has bought a lot to build a 1000 seat theatre there. This [fol. 5099] was a town of less than 5000 population. The independent theatre building was owned by the town and leased to the independent. When May said this, a local newspaper article to the same effect was given out. Schine did not build but Hersberger sold shortly thereafter, and through the purchaser of this interest Schine acquired the lease.

(g) Insley and May tried to buy an independent's theatre at Seaford and Georgetown. Insley said it was foolish that the independent did not make a deal with "Schine" because he had recently purchased the theatre at Laurel and "very likely, with the buying power they had they would get away the product" from the independent. Insley said Schine had bought a lot with the intention to

build a theatre in Seaford, and also said: "Well, if I were you I would sell the theatres to Schine because they are going to build a theatre there and, naturally, they are going to get the product." Insley, under a written contract with "Schine", had authority "in negotiations for the acquisition of motion picture theatres within the above-described territory" (Delaware, Maryland, Virginia). Seaford and Georgetown are in Delaware.

(h) At Rochester, J. Meyer Schine told independents, who were then building the "Webster", that the location was not appropriate, that it was too near the "State" (Schine's) and not justified, and Schine said he would build a theatre near the Murray theatre (owned by independents). The "State" and the "Webster" theatres were ¾ mile apart. Schine later took over the "Webster". Schine testified he said that it would not be sensible to build the "Webster", but denied that he said he would build near the "Murray."

(i) At Seneca Falls, after an independent had taken steps toward building a theatre, a sign was placed on the [fol. 5100] Seneca theatre, (shortly theretofore purchased by Schine) which read: "Closed for alterations. Will reopen soon as a Schine theatre." Independent then discontinued efforts to build. "Schine" did not re-open. Practically the same things recurred two years later. The same independent took steps to build. The sign re-appeared on the "Seneca." The independent did not go through with his plan. The "Seneca" did not open. It had not been open in several years.

12. After "Schine" opened a theatre within a town, it was arbitrarily able to keep the independents from opening a theatre in the town with suitable run product, as in Auburn, Lockport, Mt. Vernon, Paris, and Bellefontaine.

13. "Schine" was able to monopolize first run product at Corbin, Medina and Lockport even though the physical facilities of the independents in those towns were better than Schine's. He was able to monopolize the first neighborhood run in Rochester even though the physical facilities of the independents were better.

14. "Schine" cut admission prices at Corbin, Geneva, Lexington, Malone, Ogdensburg and other towns; gave out

cut rate tickets in Addison, good in his Corning theatre for students, and frequently engaged in two for ones and bank nights in other towns.

15. In cases of purchase or the assumption of leases other than those hereinbefore referred to, the agreements therefor provided for no competition by the independents for long periods of time. The non-competitive feature was also extended to cover outside towns, *i. e.:* Amsterdam, Ilion, Malone, Paris, and Lexington.

16. By reason of franchise agreements entered into prior to May 19, 1942 (voided thereafter, see Decree herein of [fol. 5101] that date) permitting special film rentals not given independents, "Schine" was able to reap benefits unavailable to independents and these were utilized against independent operators as a means of restraint. These have a definite bearing on the competitive effect of buying power. Rather than make contracts for a single year, as appears to have been Schine's practice prior to 1936, he then began making such for a period of two or three years. These contracts included both the entire circuit and also those theatres for which Schine did the booking. The great buying power of "Schine" enabled him to obtain concessions not obtainable by independents. In 1936 Schine made a three year agreement with Fox, and as a result he obtained the Fox feature product in all the towns which "Schine" then operated, and this agreement was later made to include subsequently acquired theatres. In 1938 a subsequent three year agreement was made. These agreements provided for payment of certain percentages of gross receipts after deduction of operating costs, and also fixed minimum admission charges. With Loew in 1936, a four year agreement was made under substantially the same terms as made with Fox. In 1937 a comparable three year agreement was made with Warner; in 1938 a similar one with RKO; a similar two year one with Columbia in the same year and a three year agreement was made with Universal in 1939. In the instance of United Artists, a distributing corporation, separate contracts were made for each feature for all Schine theatres. Another feature of these agreements was the inclusion of unfair and inequitable clearance provisions.

17. In numerous instances unreasonable clearances were allowed to Schine over towns in which Schine did not op-

erate, and some towns distant from 10 to upwards of 20 [fol. 5102] miles, and towns in which there were no theatres. Gloversville got clearance of 45 days over Johnstown, and "Schine" was given clearance both over Newfane and Mohawk where there were no theatres. Many clearances were over outside towns of comparably small population, distant so far that no clearance is justified, such as Randolph, Little Valley and Elliottville, New York. Many recently were given over towns over which there had been no previous clearance. Metro gave clearance in Ashland over Loudenville and Lodi, Ohio; United Artists gave clearance in Auburn over Skaneateles, New York, and Fox in Hornell over Earlville, New York. The record is replete with inter-department communications between major film representatives which recognize the unreasonableness of the clearances given to Schine at his demand. This is shown by the communications and representations made by Lehman of United Artist; Pielow of M. G. M., Dana and Sauber of Universal, Smith of Warner, and Sussman and Grassgreen of Fox, which are admissible in evidence because these men all held positions in their respective companies so that it was within the scope of their duties to make the representations in the communications that they did as a natural incident of the office, *i. e.*: branch or district manager. Pielow, MGM resident manager, wrote: "I feel that in some of the situations (unnamed) (discussing Schine contracts), the clearance that he (Lynch) is demanding is unfair * * *." Dana, branch manager of Universal wrote the district manager that he had asked Louis Schine relative to clearances over the Smalley circuit (Norwich) and that he refused to grant the privilege of serving the pictures with shorter clearance. Universal branch manager Sauber wrote Lynch that they wanted to serve Waterloo in less time than the 30 days clearance after Seneca Falls because other majors were, but Lynch refused [fol. 5103] though Universal had the right under its contract to do so. At Rochester, Scully, of Universal, said it would be satisfactory if the Madison and Monroe came within the Schine 21 day clearance. Smith, branch manager of Warner, wrote to the Home office that Canton would do more business if it were not for Schine at Ogden-burg having 30 days clearance and if it was reduced; "It will make a better condition for us all * * *." Smith also wrote relative to Seneca Falls stating that he hoped Lynch

would break down their 60 days clearance: "As I told you this morning over the phone, the clearance set up is all wet * * * ." Sussman, of Fox, wrote to Grassgreen that the 60 day clearance in Glens Falls and elsewhere seemed excessive. Sussman went on to comment that he noted that 60 day clearance was given over second run at Malone when Fox had no second run in Malone, and furthermore, as previously stated, 60 days over second run seemed excessive. Grassgreen replied that while the 60 days at Glens Falls might seem excessive, Lynch insisted upon it. Grassgreen said that Schine insisted upon the 60 day clearance because they wanted to be consistent with their demands for 60 days over subsequent independent runs.

18. In certain instances the distributors refused to negotiate with the independents for runs not bought by Schine. Such are seen in the refusal of RKO, Fox, Paramount, MGM and Universal to furnish second run at Auburn; of MGM at Amsterdam until the "Schine" deal did not materialize; by United Artists at Geneva; and by RKO, Universal and Fox at Paris.

19. In many instances the distributors refused to negotiate with the independent for runs. After "the Circuit" came into the town, in many instances it was impossible for the independent to get a good run of major product, or even to have his requests to purchase considered. RKO would [fol. 5104] not sell to the independent after "the Circuit" came in for 1933-34 in Auburn, 1935-36 in Mt. Vernon; MGM would not sell 1930-31 in Bellefontaine, 1933-34 in Lockport and Norwich, 1935-36 in Van Wert, 1936-37 in Lexington, 1938-39 in Medina; Paramount would not sell 1933-34 in Lockport, 1934-35 in Auburn, 1935-36 in Mt. Vernon; Fox would not sell 1933-34 in Norwich, 1935-36 in Amsterdam and Mt. Vernon; Universal would not sell 1933-34 in Lockport, and Norwich; United Artists would not sell 1935-36 in Mt. Vernon and Van Wert; and Warner would not sell 1933-34 in Norwich, 1935-36 in Amsterdam, 1938-39 in Medina and 1941 in Norwich. In these instances, when the independent attempted to make application for product, he was simply advised that the product had been sold to "Schine" in a circuit deal.

20. Special privileges were granted, as in the option of paying a percent of the gross receipts from product or

flat rental, and as in deducting cost of competitive devices (bank nights, etc.) from gross before computing the distributor's share. In certain instances the distributors made contracts providing for film rental based upon a percentage of the gross receipts and in certain other instances, the rental was a flat rental. When a percentage picture was played, with a competitive device (bank nights, etc.) sometimes provision was made for the deduction from the gross receipts of the cost of such competitive device before computing the distributors rental. These provisions were also in contracts with independents.

21. Special license provisions were given by tying up second runs, as in Lockport and Corning. In Lockport and Corning Schine bought some product second run and during the currency of the Schine contracts this run did not remain open for sale to others.

[fol. 5105] 22. In certain instances Schine's film contracts called for lower minimum admission charge than those for the independent for subsequent run. This happened in Lexington and Corning. Minimum admission prices were omitted from Schine's contracts, although the contracts of his independent competitors specified minimum admission prices.

The Plaza contracts in evidence prohibited it from charging less than 15 cents. The Fox contracts for the 1933-34 season permitted Schine's State Theatre with a 60-day clearance over the Plaza, to charge an adult evening orchestra admission price five cents lower than the Plaza was required to charge. Metro's 1933-34 contract for Schine's State Theatre omitted any minimum admission price requirement, as did the Universal contract for the State and RKO contracts for the Fox and State Theatres in both the 1933-34 and 1934-35 contracts.

In Lexington, Kentucky, Schine's contract with Fox for the 1936-37 first run product provided for minimum admission prices in Schine's Lexington theatre for the first run showing of Fox pictures. Schine cut its admission price below the minimum prices fixed. Schwartz complained to Fox and Paramount about these. Fox advised Schine of this complaint and Meyer Schine replied that the cuts were "quite essential and proved to be beneficial." Fox then omitted all minimum admission price require-

ments in the Schine second and third run contracts for the succeeding seasons, but provided for minimum evening adult admission prices of 15 cents for the independent theatre.

23. United Artists with respect to the Capitol theatre in Ilion wrote: "We do not want to encounter any difficulty with the Schine Circuit * * *, we want to be definitely [fol. 5106] assured that the clearance as submitted in the contracts is satisfactory to the Schine Company."

24. Sichelman, assistant sales manager for Fox, wrote Schine that Fox was free to sell ten pictures of first run and also 100% second run in Bellefontaine and that the branch manager was being directed to sell these. In reply, Lynch said, in part: "The only product which he (independent) has been able to buy has been from independent companies. There has not been a major company that has sold him any product, * * * We are charging a top of 40¢ admission * * * and we don't want to have the distributing companies make it impossible for us to continue getting this price. * * * I have also written Mr. Schwartz advising him that we will take the remaining pictures which we did not buy first run, and, have also asked him to refrain from selling this second run house." Lynch also wrote to the Fox branch manager asking him to hold off selling the independent.

25. Lynch wrote United Artists that "Schine" should be allowed the privilege of playing pictures ahead of a situation (Sodus) charging a lesser admission price." To this the reply, in part, was: "Therefore, in the future we will grant you fourteen days, or whatever clearance you see fit to take on towns like Elmira etc. in that locality."

26. The Fox home office wrote its branch with reference to Glens Falls, second run: "I note that you have changed the clearances hereby providing for sixty days over third run Glens Falls. Sixty day clearances here and elsewhere seem to be excessive," and to this the branch manager replied that Schine always provided for this clearance over third run and "George Lynch insisted in carrying it through for the future."

[fol. 5107] 27. There is much other evidence going to show the influence of "Schine" with the distributors to gain

preference over independent competitors and also the co-operation of the distributors with "Schine" to the same end.

28. As compared with some of the major distributors[1] these defendants when combined are relatively small. Some of the major companies are exhibitors as well as distributors. The producer-distributors and chains of exhibitors occupy positions from which monopolization is easily brought about.

29. The record does not disclose that Schine did not seek to furnish its patrons with those pictures which attracted the greatest revenue or that it has not furnished sufficiently attractive entertainment.

30. All findings made herein with respect to any acts committed by the defendants or any of them or any course of conduct pursued by them which the Court holds to be in violation of the antitrust laws are limited to acts committed or course of conduct pursued prior to May 19, 1942, plaintiff's counsel having stated at the opening of the trial that he would not offer any evidence beyond that date.

31. Of the Schine theatres approximately 87% are located in cities or villages with populations under 25,000 and 60% are located in cities or villages with populations under 10,000 (Pltf's. Adm. No. 23, 4617).

32. It is estimated that of the total revenue of a distributor 70% comes from the first run theatres and 30% from all other theatres playing second and subsequent runs, and that the 70% or 75% is made up of 35% from towns [fol. 5108] under 50,000 population and the other 40% from those over 50,000 population.

Conclusions of Law

1. The court has jurisdiction of this cause under the provisions of the act of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints

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[1] The term "major distributors" as used herein refers to the distributors known in the trade as Fox, Loew, Paramount, RKO, Warner, Columbia, Universal and United Artists.

and Monopolies," hereinafter referred to as the Sherman Act.

2. The defendants have violated Section 1 and Section 2 of the Sherman Act in that they have maintained an unlawful combination among themselves by means of which they have unreasonably restrained trade and commerce among the several States and have monopolized the business of operating theatres and the supplying of major films in various towns and cities, and that each of the major distributors by the methods it has employed in its dealings with the defendants and their independent theatre opposition has aided and abetted these defendants in such restraint of trade and monopolization of theatre operations.

3. The defendants have maintained an unlawful combination among themselves and with their affiliated corporations and have monopolized the licensing of the exhibition of motion picture films in various cities and towns in violation of the aforesaid sections of the Sherman Act and, through the unlawful combination between themselves and their affiliates by their predatory practices, have monopolized the business of operating motion picture theatres in various towns and have attempted to monopolize in various other towns; and the defendants have contracted, conspired and combined with each other and their affiliated corporations and with each of the aforesaid major film corporations for the purpose, and with the effect of suppressing [fol. 5109] competition and monopolizing exhibition of films distributed by each of said film corporations in various towns and cities, in violation of the aforesaid statute.

4. The principal means and methods employed by the defendant corporations through their officers and authorized representatives to obtain said monopolistic control of theatre operations are as follows:

(a) Arbitrarily depriving independents of first and second run pictures;

(b) Securing unreasonable clearances for the defendants' theatres over independent theatres;

(c) Making threats to build or open or close theatres to prevent construction or operation by independents;

(d) Lowering admission prices;

(e) Obtaining rental concessions;

(f) Restricting independents who sold to them as to periods and places of theatre operations;

(g) Making long time franchise agreements covering the "Circuit"; and

(h) Controlling the existence and extent of admission price differentials between Schine's and other competing theatres by agreement with distributors and by demanding that distributors refrain from licensing other theatres charging admission prices objectionable to Schine.

5. The plaintiff is entitled to a judgment enjoining the defendants:

(a) From monopolizing the supply of major first run films in any situation where there is a competing theatre suitable for first run exhibition thereof, and from monopoliz- [fol. 5110] ing the supply of second run films in any situation where there is a suitable theatre for second run exhibition thereof;

(b) From demanding or receiving clearance over theatres operated by others which unreasonbly restrict their ability to compete with a theatre owned or operated by a defendant, or corporation controlled by it and from attempting to control the admission prices charged by others by agreement with distributors, demands made upon distributors, or by any means whatsoever;

(c) From conditioning the licensing of films in any competitive situation, outside of Buffalo, New York, upon the licensing of films in any other situation, and from entering into any film franchise;

(d) From selling or acquiring any theatre interests pending the further order of this Court;

(e) From enforcing any existing agreements heretofore entered into by the defendants not to compete, or to restrict the use of any real estate to non-theatrical purposes; from the use of any threats or deception as a means whereby a competitor is induced to sell;

(f) From continuing the heretofore described "conspiracy" or "monopolization" in restraint of trade and commerce between the states and the entering into any com-

bination or conspiracy for the purpose or with the effect of restraining trade and commerce between the states;

(g) And directing the entering of a decree adjudging that the defendants and their affiliated corporations be dissolved, re-aligned or reorganized in their ownership and control, so that fair competition between them and other [fol. 5111] theatres be restored and hereafter maintained; and that the determination of the question of the dissolution, realignment or reorganization of the parties aforesaid and the method to be employed in the accomplishment of the same be left to be fixed by this Court after further consideration with the parties.

Dated at Buffalo, New York this 29 day of March, 1946.

John Knight, U. S. District Judge.

[fol. 5112] In United States District Court, Western District of New York

Civil No. 223

United States of America, Plaintiff,

v.

Schine Chain Theatres, Inc., et al., Defendants

Amended Judgment—March 29, 1946

This Court having rendered its opinion herein on October 8, 1945 and having filed its findings of fact and conclusions of law and entered judgment in accordance therewith on October 31, 1945 wherein the defendants herein were found to have violated Sections 1 and 2 of the Sherman Act, and this cause having again come on for hearing upon the parties' motions pursuant to Rule 52(b) of the Federal Rules of Civil Procedure to amend the aforesaid findings of fact, conclusions of law, and judgment, and the Court having rendered an opinion dated March 8, 1946 granting and denying in part each of said motions and having filed herewith findings of fact and conclusions of law amended in accordance with said opinion.

It is hereby Ordered, Adjudged and Decreed as follows:

I

1. The defendants have maintained an unlawful combination among themselves and with their affiliated corporations and have monopolized the licensing of the exhi- [fol. 5113] bition of motion picture films in various cities and towns in violation of Sections 1 and 2 of the Sherman Act and, through the unlawful combination between themselves and their affiliates by their predatory practices, have monopolized the business of operating motion picture theatres in various towns and have attempted to monopolize in various other towns; and the defendants have contracted, conspired and combined with each other and their affiliated corporations and with each of the aforesaid major film corporations for the purpose, and with the effect of suppressing competition and monopolizing exhibition of films distributed by each of said film corporations in various towns and cities in violation of the aforesaid statute.

II

Each of the defendants is hereby enjoined and restrained:

1. From monopolizing the supply of major first run films in any situation where there is a competing theatre suitable for first run exhibition thereof and from monopolizing the supply of second run film in any situation where there is a suitable theatre for second run exhibition thereof.

2. From demanding or receiving clearance over theatres operated by others which unreasonably restricts their ability to compete with a theatre owned or operated by a defendant corporation controlled by it and from attempting to control the admission prices charged by others by agreement with distributors, demands made upon distributors, or by any means whatsoever.

3. From conditioning the licensing of films in any competitive situation outside of Buffalo, New York, upon the [fol. 5114] licensing of films in any other situation and from entering into any film franchise.

4. From selling or acquiring any theatre interest pending further order of this Court.

5. From enforcing any existing agreements heretofore entered into (1) not to compete or (2) to restrict the use of any real estate to non-theatrical purposes.

6. From using any threats or deception as a means whereby a competitor is induced to sell.

7. From continuing any contract, conspiracy or combination with each other or with any other person which has the purpose or effect of maintaining the exhibition or theatre monopolies of the defendants or of preventing any other theatre or exhibitor from competing with the defendants or any of them, and from entering into any similar contract, conspiracy, or combination for the purpose or with the effect of restraining or monopolizing trade and commerce between the States.

III

The defendants and their affiliated corporations be dissolved, realigned, or reorganized in their ownership and control so that fair competition between them and other theatres may be restored and thereafter maintained. [The plaintiff and the defendants shall each within 60 days from the entry hereof submit a plan to this Court for such dissolution, realignment or reorganization as they believe will attain this end and serve copies thereof upon opposing counsel. Within 30 days after the service of such a plan upon counsel for the parties they shall advise the Court in writing of their objections, if any, to such plans and such counter or substitute proposals for the carrying out of this provision of this judgment as they may desire to submit.*]

[fol. 5115] IV

Jurisdiction of this cause is retained for the purpose of entering such further orders as may be necessary to amend, construe, and carry out this judgment after such hearings thereon as the Court may direct.

Enter:

Dated the 29 day of March, 1946.

John Knight, U. S. District Judge.

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*Clerk's Footnote: The above elimination appears in pen and ink on the original.

[fol. 5116] PLAN OF REORGANIZATION*

The following plan is submitted in accordance with Section III of the Final Judgment in this cause, dated October 31, 1945, to dissolve, realign, and reorganize the Schine circuit, so that fair competition between Schine theatres and independent theatres may be restored and thereafter maintained.

I. *Theatre Interests to be Divested*

The defendants should be divested of the following theatre interests to the end that they may not, individually or collectively, retain such film buying power as would endanger future competition in the areas where they continue to operate theatres.

A. All theatre interests in the following towns, where the defendants now own or control the only theatre:

Bath, N. Y.
Carthage, N. Y.
Dolgeville, N. Y.
East Rochester, N. Y.
Fairport, N. Y.
Federalsburg, Md.
Hamilton, N. Y.
Hudson Falls, N. Y.
Hurlock, Md.
Laurel, Del.
Milford, Del.
Newark, N. Y.
Penn Yan, N. Y.
Perry, N. Y.
St. Michaels, Md.
Saranac Lake, N. Y.
Tupper Lake, N. Y.

*Clerk's Note: This document is part of a document filed by Plaintiff's Attorney, Feb. 25, 1946, and designated as "Plan of Reorganization of the Schine Circuit proposed by the Plaintiff and Memorandum in Support Thereof."

[fol. 5117] B. All of the defendants' theatre interests in the following towns, except in one theatre to be selected by

them. The name of the theatre which the defendants desire to retain in each of said towns should be filed with the court within 30 days after approval of the Plan.

Amsterdam, N. Y.
Ashland, Ohio
Athens, Ohio
Auburn, N. Y.
Bellefontaine, Ohio
Bucyrus, Ohio
Cambridge, Md.
Canandaigua, N. Y.
Corning, N. Y.
Cortland, N. Y.
Delaware, Ohio
Easton, Md.
Geneva, N. Y.
Gloversville, N. Y.
Herkimer, N. Y.
Ilion, N. Y.
Kent, Ohio
Lexington, Ky.
Little Falls, N. Y.
Lockport, N. Y.
Middlesboro, Ky.
Maysville, Ky.
Ogdensburg, N. Y.
Oneonta, N. Y.
Oswego, N. Y.
Paris, Ky.
Piqua, Ohio
Ravenna, Ohio
Richmond, Ky.
[fol. 5118] Salamanca, N. Y.
Seneca Falls, N. Y.
Tiffin, Ohio
Watertown, Ohio
Wooster, Ohio

C. Theatres still undisposed of under consent order of 1942:

Cumberland, Md.
Strand Theatre
Harlan, Ky.

Margie Grand Theatre
(50% interest)
Lexington, Ky.
Opera House and
Ada Meade Theatres
Malone, N. Y.
Plaza Theatre
Mt. Vernon, Ohio
Memorial Theatre

D. The Riviera or Liberty and the Monroe or Madison Theatres in Rochester, N. Y. to be sold, with the defendants designating the two theatres in this group of four to be retained, within 30 days after approval of the Plan.

E. The existing pooling arrangements in the following towns should be dissolved by sale of the defendants' stock in the respective corporations operating the theatres there:

Fostoria, Ohio
Medina, Ohio
Norwalk, Ohio
Shelby, Ohio
Ballston Spa, N. Y.
Granville, N. Y.
Mechanicville, N. Y.
Whitehall, N. Y.

[fol. 5119] The pooling arrangement now in effect in Syracuse, N. Y. should be terminated by sale of Schine's interest in SKE Operating Co. and return of Schine's theatres to the defendants for separate operation.

F. In addition to the foregoing requirements, the defendants should also make an election as to which of the following towns they will withdraw from completely in the following areas where the defendants now operate in two or more towns within approximately 25 miles of each other. In each designated area the defendants should dispose of all theatre interests except those held in one town. As to the town in which the defendants elect to remain, the option specified in "B" above should apply:

Area 1
Kent and Ravenna, Ohio
Area 2
Ashland and Wooster, Ohio

Area 3
Bucyrus and Tiffin, Ohio
Area 4
Cambridge and Easton, Md.
Area 5
Lexington and Paris, Ky.
Area 6
Amsterdam and Gloversville, N. Y.
Area 7
Ilion, Herkimer, and Little Falls, N. Y.
Area 8
Auburn and Seneca Falls, N. Y.
Area 9
Geneva and Canandaigua, N. Y.

II. *Terms of Sale*

The properties described in Section I hereof should be sold as rapidly as possible upon such terms and upon such [fol. 5120] prices as the court may approve. When feasible, theatre sales should be made by transfer of the ownership of existing corporations through which said theatres are owned and operated. The parties should be afforded a reasonable opportunity to file objections with the court to any proposed sale and if the court finds that the proposed sale might itself result in an unreasonable restraint of competition or would otherwise not effectuate the purpose of the Plan, it may disapprove the sale. In exercising any choice among prospective purchasers for the same property, the court should favor the purchaser which will, after approval of the sale, have the lesser circuit buying power. In no event should a sale to any person in any way affiliated with a distributor of motion pictures be approved.

III. *Trustee for Sale*

In order to effectuate this Plan the court should appoint a trustee with full power to negotiate and make the sales provided above. The trustee should be required to (1) make every effort to sell these theatres as rapidly as possible by public advertisement for bids, private negotiations, and the employment of real estate or business brokers whenever necessary; (2) present to the court for approval such sales as he believes will effectuate the Plan; and (3) present a

quarterly report to the court which will include a detailed account of (a) all offers received for any of said properties, together with the names and addresses of the offerors and the amounts offered, (b) the efforts made to sell all unsold theatres, and (c) the prospects for disposition of all unsold theatres in the succeeding quarter. If within a period of one year the trustee has not succeeded in disposing of more than one-half of the total properties required to be sold, the court should review the trustee's operations for the purpose of determining what, if any, modification in the disposition procedure should be made in order to insure the completion of the Reorganization Plan within the next succeeding year. [fol. 5121] The trustee should be authorized (1) to examine all books and records of defendants, to employ such accounting assistance as may be necessary for the purpose of ascertaining any information as to earnings or value of the theatres in question as he may require; (2) to have free access to the theatres involved at all times for the purpose of showing them to prospective purchasers, providing only that such access shall not interfere with the normal operation of the theatres; (3) to examine all executed film licenses of the defendants and to ascertain from inquiry of the defendants' employees the current status of film licensing negotiations and other data relevant to the current operation of the theatres; and (4) to employ all assistance necessary to negotiate and close sales for the properties in question, including legal counsel.

The expenses and compensation of the trustees should be paid from the proceeds of sales made by him in such amounts as the court may from time to time approve. In determining his compensation the number and rapidity of the sales made should be considered. All amounts paid by purchasers should be received by the trustee and distributed by him only upon the order of the court. Except as specifically outlined above or as expressly authorized by the court, the trustee should not participate in the actual operation of any of the theatres in question.

IV. *Booking Agencies Prohibited*

No defendant shall buy or book films for any theater other than those in which the defendant owns a financial interest.

V. *Restrictions on Schine Expansion*

No defendant shall acquire a financial interest in any additional theatres except after an affirmative showing that such acquisition will not unreasonably restrain competition. Such showing shall be made before this court upon reasonable notice to the Attorney General at Washington, D. C.

[fol. 5122] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PLAN OF REORGANIZATION OF THE SCHINE CIRCUIT PROPOSED BY PLAINTIFF AND MEMORANDUM IN SUPPORT THEREOF—Filed February 20, 1946

The purpose of the Plan submitted by plaintiff and attached hereto is to comply with Section III of the Judgment and at the same time permit the greatest possible flexibility in the defendants' mode of compliance. The Plan accomplishes only a partial dissolution of the circuit as such inasmuch as it leaves the defendants in possession of a substantial circuit of theatres. It provides no realignment of theatre ownership in the sense of transferring operations from one area to another, but it does reorganize the circuit by a method of theatre divestiture which is calculated to insure active competition for the defendants' theatres wherever they operate.

The Plan substantially dilutes the circuit buying power possessed by the defendants and found by the court to have been illegally used by them to achieve their present dominance of motion picture exhibition in the areas where they operate. This is essential to a restoration of competitive conditions. We have attempted to insure such restoration of theatre operating competition in the future in the areas involved without eliminating the defendants as a substantial competitive factor in these areas. Thus, in Utica, Buffalo, Glens Falls, Norwich, New York, and Salisbury, Maryland, where other existing theatres offer substantial competion, Schine's holdings would not be disturbed by this Plan.

The proposed sale of the theatres listed in Section I, paragraph "A", divests the defendants of established monop-

olies in one-theatre closed towns by opening these towns to [fol. 5123] competition in the only sense possible. In these towns theatres are henceforth to be operated by owners who will be dependent for success upon the extent to which they can individually meet the needs of these communities rather than by the use of monopolistic circuit buying power.

The divestiture proposed for the towns listed in paragraph "B", Section I of the Plan, in each of which the defendants own or operate two or more theatres, permits the defendants to continue to operate in each of these towns what they regard as the best existing theatre. However, the sale of the other theatres in these town to independents will create a situation where these towns may enjoy competitive theatre service. In all but Amsterdam, Auburn, Corning, and Watertown, New York, and Van Wert, Ohio, there is no competition of any kind at the present time. In the latter four towns there is a single competitor in each which the record shows has not been able to offer substantial competition to Schine in the past. It has therefore been necessary to provide for divestiture in these towns, as well as in the closed situations, to insure such competition.

Rochester, New York, presents a special situation in which Schine has and will still have upon completion of the Plan more theatres than any other exhibitor in the town. However, in view of the fact that Schine's position is subordinate to the downtown first run theatres, it was felt that the general competitive situation in this town would be best served by limiting the divestiture to two theatres, which would permit the first neighborhood run competition which should have occurred but was illegally suppressed by Schine when the Monroe and Madison were independently owned.

The Plan further provides for terminating all of the existing pooling arrangements. These are the situations where Schine partially or wholly eliminated competition by the formation of corporations jointly owned by the defendants and other exhibitors in the towns in question and the Plan provides for complete withdrawal of the defendants from these pools.

Since the completion of divestiture along these lines would still leave the defendants with a substantial circuit of more than 50 theatres, some of which would be concentrated in relatively small geographical areas, in order to insure [fol. 5124] area as well as town competition, the require-

ments specified in paragraph "F" have been added. They break up these area concentrations by preventing operation in two or more towns within twenty-five miles of each other and thus further dilute the circuit buying power possessed by the defendants.

In fixing the terms of sale complete flexibility has been provided with a view to actually accomplishing the sales required to effectuate the Plan as rapidly as possible, although the rights of the parties have been protected by a provision for court approval of every sale. The Plan, to be effective, of course, contemplates the transfer of the theatres involved to independent exhibitors rather than those affiliated with motion picture distributors or other large circuits and appropriate provisions have been inserted to this end.

The plan also provides for the appointment of an agent by the court to take active charge of the execution of the Plan, but preserves to the defendants the right to operate the theatres involved pending sale. In view of the history of the defendants' failure to comply with the prior consent order for the sale of a limited number of theatres nearly four years after its entry, we think the court would be fully warranted in appointing a receiver to actually take over and operate the defendants' theatres pending completion of the Plan. However, we have not proposed a receivership at this time simply because we feel that the court's agent may function more effectively if his entire time is devoted to actually making theatre sales instead of concerning himself with operating details. The record made in the course of efforts to enforce the prior consent order has fully demonstrated that the defendants have neither the will nor the ability to dispose rapidly of the properties ordered sold.

Even if now reconciled to the court's decision, the defendants' prior failure to perform a bargain which they themselves made is conclusive evidence that under no circumstances may the execution of a plan be left to them. Anything less than a trustee for sale leaves the dissolution in the hands of those who will profit from postponing it. The choice is therefore one between a trustee for sale and a full-scale receiver. In our view the less drastic trustee for sale method should be given a trial, although a receivership [fol. 5125] may ultimately be necessary if the trustee's more limited powers prove insufficient to effectuate the Plan.

The provisions against booking films for others and acquiring interests in other theatres are self-explanatory. Any plan of dissolution could, of course, be frustrated by an expansion of either character. The safeguard imposed by Section V simply follows in express language the one approved by the court in *United States* v. *Crescent Amusement Co., Inc., et al.*, 323 U. S. 173.

Respectfully submitted, Robert L. Wright, Philip Marcus, Louis B. Schwartz, Special Assistants to the Attorney General.

Wendell Berge, Assistant Attorney General.
George L. Grobe, United States Attorney.

[fol. 5126] Plan of Reorganization

The following plan is submitted in accordance with Section III of the Final Judgment in this cause, dated October 31, 1945, to dissolve, realign, and reorganize the Schine circuit so that fair competition between Schine theatres and independent theatres may be restored and thereafter maintained.

I. *Theatre Interests to be Divested*

The defendants should be divested of the following theatre interests to the end that they may not, individually or collectively, retain such film buying power as would endanger future competition in the areas where they continue to operate theatres.

A. All theatre interests in the following towns, where the defendants now own or control the only theatre:

Bath, N. Y.
Carthage, N. Y.
Dolgeville, N. Y.
East Rochester, N. Y.
Fairport, N. Y.
Federalsburg, Md.
Hamilton, N. Y.
Hudson Falls, N. Y.
Hurlock, Md.
Laurel, Del.
Milford, Del.
Newark, N. Y.
Penn Yan, N. Y.
Perry, N. Y.
St. Michaels, Md.
Saranac Lake, N. Y.
Tupper Lake, N. Y.

B. All of the defendants' theatre interests in the following towns, except in one theatre to be selected by them.

The name of the theatre which the defendants desire to retain in each of said towns should be filed with the court within 30 days after approval of the Plan.

Amsterdam, N. Y.	Lexington, Ky.
Ashland, Ohio	Little Falls, N. Y.
Athens, Ohio	Lockport, N. Y.
Auburn, N. Y.	Middlesboro, Ky.
Bellefontaine, Ohio	Maysville, Ky.
Bucyrus, Ohio	Ogdensburg, N. Y.
Cambridge, Md.	Oneonta, N. Y.
Canandaigua, N. Y.	Oswego, N. Y.
Corning, N. Y.	Paris, Ky.
Cortland, N. Y.	Piqua, Ohio
Delaware, Ohio	Ravenna, Ohio
Easton, Md.	Richmond, Ky.
Geneva, N. Y.	Salamanca, N. Y.
Gloversville, N. Y.	Seneca Falls, N. Y.
Herkimer, N. Y.	Tiffin, Ohio
Ilion, N. Y.	Watertown, N. Y.
Kent, Ohio	Wooster, Ohio

[fol. 5127] C. Theatres still undisposed of under consent order of 1942:

Cumberland, Md. Strand Theatre	Malone, N. Y. Plaza Theatre
Harlan, Ky. Margie Grand Theatre (50% interest)	Mt. Vernon, Ohio Memorial Theatre
Lexington, Ky. Opera House and Ada Meade Theatres	

D. The Riviera or Liberty and the Monroe or Madison Theatres in Rochester, N. Y. to be sold, with the defendants designating the two theatres in this group of four to be retained, within 30 days after approval of the Plan.

E. The existing pooling arrangements in the following towns should be dissolved by sale of the defendants' stock in the respective corporations operating the theatres there:

Fostoria, Ohio	Balston Spa, N. Y.
Medina, Ohio	Granville, N. Y.
Norwalk, Ohio	Mechanicville, N. Y.
Shelby, Ohio	Whitehall, N. Y.

The pooling arrangement now in effect in Syracuse, N. Y. should be terminated by sale of Schine's interest in SKE Operating Co. and return of Schine's theatres to the defendants for separate operation.

F. In addition to the foregoing requirements, the defendants should also make an election as to which of the following towns they will withdraw from completely in the following areas where the defendants now operate in two or more towns within approximately 25 miles of each other. In each designated area the defendants should dispose of all theatre interests except those held in one town. As to the town in which the defendants elect to remain, the option specified in "B" above should apply:

Area 1
Kent and Ravenna, Ohio
Area 2
Ashland and Wooster, Ohio
Area 3
Bucyrus and Tiffin, Ohio
Area 4
Cambridge and Easton, Md.
[fol. 5128] Area 5
Lexington and Paris, Ky.
Area 6
Amsterdam and Gloversville, N. Y.
Area 7
Ilion, Herkimer, and Little Falls, N. Y.
Area 8
Auburn and Seneca Falls, N. Y.
Area 9
Geneva and Canandaigua, N. Y.

II. *Terms of Sale*

The properties described in Section I hereof should be sold as rapidly as possible upon such terms and upon such prices as the court may approve. When feasible, theatre sales should be made by transfer of the ownership of existing corporations through which said theatres are owned and operated. The parties should be afforded a reasonable opportunity to file objections with the court to any proposed sale and if the court finds that the proposed sale might itself result in an unreasonable restraint of competition or would otherwise not effectuate the purpose of the

Plan, it may disapprove the sale. In exercising any choice among prospective purchasers for the same property, the court should favor the purchaser which will, after approval of the sale, have the lesser circuit buying power. In no event should a sale to any person in any way affiliated with a distributor of motion pictures be approved.

III. *Trustee for Sale*

In order to effectuate this Plan the court should appoint a trustee with full power to negotiate and make the sales provided above. The trustee should be required to (1) make every effort to sell these theatres as rapidly as possible by public advertisement for bids, private negotiations, and the employment of real estate or business brokers whenever necessary; (2) present to the court for approval such sales as he believes will effectuate the Plan; and (3) present a quarterly report to the court which will include a detailed account of (a) all offers received for any of said [fols. 5129-5132] properties, together with the names and addresses of the offerers and the amounts offered, (b) the efforts made to sell all unsold theatres, and (c) the prospects for disposition of all unsold theatres in the succeeding quarters. If within a period of one year the trustee has not succeeded in disposing of more than one-half of the total properties required to be sold, the court should review the trustee's operations for the purpose of determining what, if any, modification in the disposition procedure should be made in order to insure the completion of the Reorganization Plan within the next succeeding year.

The trustee should be authorized (1) to examine all books and records of defendants, to employ such accounting assistance as may be necessary for the purpose of ascertaining any information as to earnings or value of the theatres in question as he may require; (2) to have free access to the theatres involved at all times for the purpose of showing them to prospective purchasers, providing only that such access shall not interfere with the normal operation of the theatres; (3) to examine all executed film licenses of the defendants and to ascertain from inquiry of the defendants' employees the current status of film licensing negotiations and other data relevant to the current operation of the theatres; and (4) to employ all assistance necessary to negotiate and close sales for the properties in question, including legal counsel.

The expenses and compensation of the trustees should be paid from the proceeds of sales made by him in such amounts as the court may from time to time approve. In determining his compensation the number and rapidity of the sales made should be considered. All amounts paid by purchasers should be received by the trustee and distributed by him only upon the order of the court. Except as specifically outlined above or as expressly authorized by the court, the trustee should not participate in the actual operation of any of the theatres in question.

IV. *Booking Agencies Prohibited*

No defendant shall buy or book films for any theatre other than those in which the defendant owns a financial interest.

V. *Restrictions on Schine Expansion*

No defendant shall acquire a financial interest in any additional theatres except after an affirmative showing that such acquisition will not unreasonably restrain competition. Such showing shall be made before this court upon reasonable notice to the Attorney General at Washington, D. C.

[fol. 5133] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

DEFENDANTS' OBJECTIONS TO PLAINTIFF'S SO-CALLED PLAN OF REORGANIZATION

April 1, 1946

On or about the 25th day of February, 1946, the plaintiff submitted to the Court what is called a "Plan of Reorganization of the Schine Circuit", together with a supporting memorandum. This "Plan" purported to be submitted in compliance with Section III of the Judgment. Among the encomia self-applied by the plaintiff to the "Plan" plaintiff said: "The Plan accomplishes only a partial dissolution of the circuit as such inasmuch as it leaves the defendants in possession of a substantial circuit of theatres. It provides no realignment of theatre ownership in the sense of transferring operations from one area to

another, but it does reorganize the circuit by a method of theatre divestiture which is calculated to insure active competition for the defendants' theatres wherever they operate."

[fol. 5134] The defendants are filing herewith their objections to the "Plan" submitted by the plaintiff as provided for by Section III of the Judgment. Each objection is filed by each defendant separately.

In that part of the opinion of the Court which was preparatory to paragraph (7) of the directive language and to paragraph III of the Judgment, the Court said (pp. 39-40):

> "Some of the major companies are exhibitors as well as distributors. The government by the Consent Decree entered in an agreement setting up procedure purported to provide a fair and equitable sale, distribution and showing of pictures to all distributors. Just what was accomplished by the Decree, other than some arbitration of clearances, does not appear. The government in entering into the Consent Decree evidently contemplated that such decree would obviate the necessity of a trial of the issues and intended to let by-gones be by-gones. As compared with some of the major distributors, these defendants when combined are relatively small. The Consent Decree, therefore, brings up the question of whether the harsh determination of dissolution as urged by the government should be compelled or whether some adjustment or reorganization can be agreed on or fixed by the court which will be as definitely as possible prevent future violations."

Some weeks later when the case of United States v. Paramount, et al., was being argued before the Three-Judge Expediting Court in the Southern District of New York, Circuit Judge Augustus N. Hand voiced practically the identical sentiments in the excerpt quoted on pp. 33 and 34 of our brief, dated February 25, 1946, and read to this Court in the course of the argument of defendants' motion [fol. 5135] under Rule 52 B, on February 25, 1946, at page 108 of the transcript, to wit:

> "Judge Hand: Why do you have to sell theatres in order to cure that, if there is a wrong there?

Mr. Wright: Well, the agreement is, I would say, per se illegal, and of course——

Judge Hand: You seem really to aim at, I won't say nothing, because you are calling attention now to other wrongs, but your great aim is to upset all the ownership of theatres. Now that is an extremely drastic remedy that I should think was extremely unlikely for this court to give. But that is merely a first impression by myself, and I have got to study this thing very carefully in other ways than just by reading through the briefs once, of course.

But this sort of thing that you are arguing now is the kind of thing that has always been argued, and remedies have constantly been granted that were thought sufficient. Maybe they have not been against the kind of thing you are calling our attention to here."

Jacob Siegel Co. v. *Fed. Trade Comm.*, Mar. 25, 1946, 325 U. S. ——, furnishes in another field a decision pertinent in this case. The Federal Trade Commission had found that the petitioner's trade name, Alpacuna, applied to coats containing no vicuna, was deceptive and misleading. Consequently, the Commission, in its order, banned the use of the word Alpacuna. The Supreme Court reversed because "the policy of the law to protect them as assets of a business indicates that their destruction should not be ordered if less drastic means will accomplish the same result.'"

The directive language of this Court leading to paragraph III of the Judgment reads as follows:

[fol. 5136] "(g) and directing the entering of a decree adjudging that the defendants and their affiliated corporations be dissolved, re-aligned or reorganized in their ownership and control, so that fair competition between them and other theatres be restored and hereafter maintained; and that the determination of the question of the dissolution, re-alignment or reorganization of the parties aforesaid and the method to be employed in the accomplishment of the same be left to be fixed by this court after further consideration with the parties."

The above quoted excerpts from the opinion of this Court must be borne carefully in mind in considering

whether the plaintiff's "Plan" even remotely approximates what the Court had in mind in its decision. It is submitted that it does not.

The very word "Plan" presupposes familiarity on the part of the planner with the subject matter of the plan and a careful study by the planner of the problem involved, so that the application of the plan will have at least a reasonable chance of accomplishing the desired results. The "Plan" as suggested by the plaintiff, does not indicate any familiarity with the subject matter, nor any careful study by the planner of the problem involved, nor any reasonable prospect that the "Plan" will accomplish the professed desired results.

In this instance the plaintiff admits that its "Plan" does not provide for any "re-alignment" of the circuit, and the plaintiff further admits that the "Plan" provides for a "partial dissolution" of the circuit, which the plaintiff seeks to justify by lugging in the word "reorganization" without any justification whatsoever. In submitting this "Plan" the plaintiff has, by its own admission, adopted the very remedy characterized by the Court as "harsh".

[fol. 5137] The Court has stated in so many words that the purpose of the judgment should be to prevent as definitely as possible future violations of the Statute and to restore and hereafter maintain fair competition between theatres operated by the defendants and other theatres by some method of adjustment or reorganization to be agreed upon or fixed by the Court. Restoration of competition necessarily implies that at some time in the past competition did actually exist between Theatre "A" and Theatre "B" and in order to justify the inclusion of Section III of the Judgment, the plaintiff must prove as to each theatre affected by Section III that such competition did exist and was *illegally* eliminated by the defendants in violation of the provisions of the Sherman Act. Thus in cases where there never was, and in all probability never will be any competition, or in cases where existing competition was eliminated by legal methods, there is no occasion for any action on the part of the Court such as is contemplated here. In the brief submitted by the plaintiff on December 26, 1944 (when the plaintiff was endeavoring to persuade the

Court that some limited divestiture might be necessary) the plaintiff said, on page 60:

> "As a further means of dissipating the illegal effects of the defendants' monopoly, it may be necessary to order the sale of specific theatres *in each town where the defendants were shown to have eliminated previously existing independent competition, to the end that such competition may be restored.*" (Italics ours)*

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* The above quoted sentence is the first sentence in the fifth paragraph of Section III C of plaintiff's brief. The page citation is to the printed copy of said brief.

[fol. 5138] However, after the plaintiff was able to persuade the Court to decide this case in its favor, the plaintiff discarded its sheeps' clothing and now seeks to compel the sale not only of one or more theatres in each town in which the defendants operate (with only four exceptions) but also to compel the defendants to get out of certain towns entirely without any reference whatsoever to the status of competition in these towns at any time during or prior to the existence of the Schine Circuit. There is absolutely no justification for the plaintiff's attempt in the remainder of the above quoted paragraph to drag in the May, 1942, order as an indication that it is difficult to induce independents to enter into competition with Schine and that this alleged fact is the reason why Schine was unable to dispose of all of the theatres covered by said May, 1942, order. There is not a scintilla of evidence in the record of the truth of the claim made by the plaintiff in this paragraph, and the fact is that the theatres which were not sold at the time the order expired were not sold because no one wanted to pay as much money as Schine had paid for these theatres.

In formulating its so-called "Plan" the plaintiff has attempted to deal not only with the thirty-two towns regarding which the plaintiff offered evidence and which are mentioned in the opinion and findings, but with every town in which the Schine Circuit operates one or more theatres and, in fact, with two towns in which Schine does not operate any theatres at all. Since obviously the defendants were not required to offer any evidence as to towns

ignored by the plaintiff in the presentation of its affirmative case, the record is barren of any information (except purely statistical information contained in the answers to interrogatories) regarding the majority of the towns which [fol. 5139] would be affected by the "Plan". If, therefore, in our discussion of individual towns we should make any statements of fact not found in the record, we assure the Court that such statements are made only because the plaintiff seeks to include in the judgment towns not mentioned in the evidence and can be proved beyond all question of doubt by indisputable evidence.

The only sense in which the plaintiff may be said to have planned anything is that, realizing from the language of the Court that a complete dissolution of the circuit would not be ordered, plaintiff has determined the maximum number of theatres which it felt that it might be able to persuade the Court to take away from the defendants, and has tortured out what it is pleased to call a "Plan of Reorganization" to accomplish this end. This will appear in our detailed objections as we proceed to discuss the "Plan" item by item. In discussing this "Plan" item by item we wish to make it clear that every single item of the "Plan" is so vicious that it alone is sufficient entirely to destroy the legality, propriety or effectiveness of the "Plan". This is not a "Plan" which can be corrected. It must be rejected *in toto*.

[fol. 5140]

I

The Submission, Discussion, Approval or Execution of any Plan at this Time is Premature

A

At the time that we entered upon the preparation of these objections the Court had under consideration a motion by the defendants under Rule 52B to amend the findings, conclusions and judgment herein, and a similar motion by the plaintiff, and we intended strongly to stress the point that no plan should be submitted, discussed, approved or put into execution until the Court had decided these motions, and settled the findings of fact, conclusions and judgment in final form.

We are now in receipt of the decision of the Court upon each of these motions, from which it appears that while the

Court has disallowed most of our proposed amendments, it has allowed two amendments to the judgment requested by the plaintiff. We, therefore, respectfully submit that no action is necessary or proper under the judgment until the entry of a new judgment in conformity with the decision of the Court and the expiration of the statutory time required after the entry of such judgment.

Therefore, in filing these objections at this time, and in proceeding with a hearing on April 16, 1946, the defendants and each of them do so, reserving, as to each defendant, its respective rights in the premises and without waiving any objection to the consideration at this time of the "Plan" submitted by the plaintiff.

[fol. 5141] B

Aside from any legal consideration, as urged in A above, it is submitted that until the Supreme Court of the United States shall have heard and determined the appeal which the defendants and each of them will now take from the judgment about to be entered pursuant to the Court's decision on March 8, 1946, no "Plan" should be submitted, discussed, approved, or put into execution.

This proposition was partially argued before the Court on February 25, 1946, and the Court was apparently influenced in deciding in favor of immediate consideration by plaintiff's argument that not to do so at this time would result in two appeals to the Supreme Court. A study of the transcript indicates that this discussion was diverted into other channels before the question had been fully argued.

Presumably even the plaintiff will concede that nothing can be done about putting any plan approved by the Court over the objections of any defendant into execution until the entire matter has been passed upon by the Supreme Court. Certainly no trustee appointed by this Court would be allowed to enter upon a course of selling theatres belonging to the defendants until the Supreme Court has decided our appeal.

In the *Crescent* case, so much relied upon and cited by the plaintiff (and frequently cited by the Court), the plan of divestiture has not as yet been put into execution, although judgment was entered in the District Court on May 17, 1943, and affirmed in the Supreme Court on December

11, 1944. In the appendix hereto we print the latest ruling of the Court further extending the time to perform the acts of dissolution. There was never any danger of the possibility of two appeals in that case.

[fol. 5142] II

The Court is without power or authority under the Sherman Act, or any other act, judicially to enforce performance of the plan submitted by the Plaintiff in this case.

This objection is entirely apart from the objection which will be made *infra* in relation to the illegality and unconstitutionality of the method of sale proposed by the plaintiff. The objection is based upon the fact that the Court has not and never has had before it in this case the parties whose compliance would be necessary to carry into effect the plaintiff's "Plan."

This is not the type of case referred to in the *Crescent* case where the Supreme Court held that the absence of minority stockholders of defendant companies was not a legal barrier to the separation of the companies, citing *United States* v. *American Tobacco Co.* The rule applicable in this case is that laid down by the Supreme Court in *Minnesota* v. *Northern Securities Co.*, 183 U. S. 199, where the Court, citing *Hogan* v. *Walker*, 14 How. 35, 14 L. ed. 315, said:

> "It remains true, notwithstanding the act of Congress and the 47th rule, that a circuit court can make no decree affecting the right of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person that complete and final justice cannot be done between the parties to the suit without affecting those rights."

In this case, no showing has been made that the theatres which the plaintiff is seeking to persuade the Court to take away from the defendants are owned, leased or operated [fol. 5143] by the defendants who are before the Court in this suit. In fact, so far as there is any evidence, the contrary, for the most part, appears. On September 29, 1944, at the request of the plaintiff, and the suggestion of the Court, the defendants furnished the plaintiff with a list of the operating companies listed in answer to Interrogatory

15 and the theatres then operated by said companies. This stipulation was marked Exhibit 994. There was no evidence as to the companies owning the fee of these theatres or holding underlying leases thereon, and there is no evidence as to the state of affairs existing since September 29, 1944.

The plaintiff is asking the Court to order the sale of certain theatres notwithstanding the fact that with very few exceptions there is nothing in the record to indicate that the persons owning, leasing or operating these theatres are present before the Court and subject to any order or judgment in this case.

The plaintiff apparently realizes this and has suggested that, when feasible, theatre sales should be made by the transfer of ownership of existing corporations through which the theatres are owned and operated, but the burden would be upon the plaintiff to show that such method of transfer would be feasible. No such evidence is before the Court nor can it be produced.

It may be conceded, but only for the purpose of this single objection, that the situation would be different *if the defendants and their subsidiaries were to be regarded as a single unit.* The defendants urged this theory upon the Court, as is clearly shown in defendants' brief submitted on January 24, 1945, pp. 853 to 855, defendants' brief dated February 25, 1946, pp. 31-34, and upon the argument before [fol. 5144] this Court on February 25, 1946, appearing on pp. 69-76, inclusive, of the transcript, and will press for its acceptance by the Supreme Court on any appeal herein, but for the present at least the theory was rejected by the Court, first, in its opinion on pp. 10 and 11, and again in the argument above mentioned where the Court stated at page 73 of the transcript:

"The Court: Well, in your construction such an aggregation of entities would be exempt from the Statute? They couldn't commit a conspiracy?" And again on page 74: "The Court: I know there were. But, if you are right in that construction that goes to the very foundation of the statute itself."

Therefore, we are faced with this position; if the Schine Companies are to be regarded, as we contend, as a single entity, the Court has before it all parties whose presence is necessary to enforce an order of sale, but in that case

there would be no judgment because there would be no conspiracy. (This Court, in its opinion, quoted the Supreme Court opinion in the *Crescent* case as follows:

> "We may assume that if a single exhibitor launched such a plan of economic warfare, he would not run afoul of the Sherman Act.")

If, on the other hand, the Schine Companies are to be regarded as separate individuals so as to permit proof of conspiracy between them, the Court has not now before it the companies whose presence is necessary to permit the enforcement of a plan such as the plaintiff is seeking here.

[fol. 5145] III

The proposed "plan" seeks the divestiture of theatres which were acquired in the ordinary course of business by entirely legal methods and without any violation or thought of violation of the statute.

Except as the Court may have found to the contrary as to some of the thirty-two situations mentioned in the opinion and in the findings of fact, there is absolutely no evidence even remotely indicating that the acquisition of the theatres comprising the Schine Circuit was other than by wholly legal means and in the ordinary course of business, nor is there any evidence that the defendants in their operation of the said theatres have in any way violated the Sherman Act.

(The defendants contend that the evidence presented regarding the thirty-two situations referred to in the opinion does not indicate any violation of the statute, but for the purpose of our discussion of this point we shall omit these thirty-two situations and deal only with the situations as to which there is no evidence at all).

Notwithstanding the failure on the part of the plaintiff (and we are certain that such failure was due solely to its inability to produce the same) to produce any evidence indicating or tending to indicate any violation by the defendants of the Statute in these other situations, the plaintiff now asks the Court to take away from the circuit, theatres which it obtained and has been operating in a perfectly legal manner.

As has been pointed out, the failure of the plaintiff to introduce evidence as to many situations, other than the

thirty-two mentioned in the opinion, led the defendants to confine the evidence offered by them to these thirty-two situations and resulted in a trial record barren of any information regarding the majority of the towns which [fol. 5146] would be affected by the "Plan." However, the Court will find in the answering affidavits submitted by Schine in opposition to the plaintiff's motion for a preliminary injunction, which was the opening gun fired by the plaintiff in this case, sworn and uncontradicted statements from many of the former owners of theatres now operated by the circuit, setting forth the circumstances under which these theatres were acquired by the Schine Circuit.

Thus, as in the cases of Messrs. Wilkins, Wheatley & Brohan (in Milford, Delaware, Easton and Federalsburg, Maryland and Cambridge, Maryland) the owners had substantial outside business interests to which they desired to devote all of their time, and for which reason they desired to sell the theatres to an experienced operator. In other cases, the terms offered by the circuit were so favorable that the former owner considered it good business to make a deal. In none of these instances was there any indication whatsoever that any of the former operators was influenced to dispose of his theatre by reason of any so-called threat made directly or indirectly by any member of the Schine Circuit, or by reason of any burdensome competition.

Even with respect to the thirty-two situations mentioned in the opinion, we submit that although the testimony of many obviously biased and hostile witnesses was introduced by the plaintiff, there is no evidence that any former independent exhibitor was "forced out of business" in any town, or that interstate commerce was restrained by any improper activities on the part of Schine.

The attempt on the part of the plaintiff to take away from the Circuit property legally acquired and legally operated is not justified by any principle of law under the Sherman Act or any other statute, and is even inconsistent with the theory upon which the plaintiff submitted this case to the Court as indicated in the quotation from plaintiff's brief, page 5, *supra*.

[fol. 5147]

IV

Objections to the Disposition Proposed by the Plaintiff with Respect to Each Individual Town.

A

Towns in Which the Plaintiff Concedes the Existence of Competition

The plaintiff refrains from disturbing the Schine interests in the following towns: Utica, Buffalo, Glens Falls, Norwich, New York, and Salisbury, Maryland.

It is significant to note that the Schine Circuit has not operated any theatres in Utica since 1930, and that in Buffalo the circuit operates only two neighborhood houses in a city of nearly 600,000 inhabitants, where several other circuits, much stronger than the Schine Circuit, are established.

Furthermore, if this principle were to be adopted, we are unable to see why there should not be included in this category such towns as Syracuse, Cumberland, Amsterdam, Gloversville, Auburn, Corning and Watertown. In all of which the Schine interests have substantial competition, as will be indicated in our detailed analysis of the separate towns.

B

One Theatre Towns

The plaintiff names seventeen towns, in fifteen of which the Schine Circuit operates the only theatre in the town, and in one of which (Dolgeville, New York) the Schine Circuit has no theatre. These towns are all small towns, running from Hurlock, Maryland, with a population of 800, to Saranac Lake, New York, with a population of 7,138, but for the most part the population is 5,000 or under.

[fol. 5148] Newark should be included in the two or more theatre towns because, while there is only one theatre in operation there, Schine also holds the lease upon the Crescent Theatre. (Int. Ans. 17(A) and 18, p. 5.) The theatres in East Rochester and Fairport should properly be treated as Rochester suburban theatres. Both East Rochester and Fairport are suburbs of Rochester and their theatres are to all intents and purposes neighborhood houses subject to clearances from first run downtown Rochester.

The remainder are typical one theatre towns, capable of supporting one theatre and one theatre only. In fact, in some cases, such as Hurlock, Maryland, they have difficulty in supporting even one theatre. In seeking the sale of these towns the plaintiff wholly disregards the principle

for which it argued in the passage quoted from its brief of December 14, 1944, which principle was accepted by the Court in the passages quoted, *supra*, from the opinion. The competitive situation (there never was any competition, there is no present competition, and there is no likelihood that there ever will be competition) would not be changed one iota by the sale of these towns, or any of them; the only result would be that instead of the towns being operated by Schine they would be operated by some other person under exactly the same conditions.

None of these towns is even mentioned in the opinion or findings, except Perry, where Schine tried to buy the theatre, but the independent preferred to sell it to a different circuit which circuit subsequently sold to Schine, and Carthage where RKO and United Artists apparently at one time granted clearances (over whom it does not appear, which meant nothing, and against which there was never any complaint made).

[fol. 5149] Detailed Historical Analysis *

(F.M.) Bath. (Population 6,496.) Schine acquired the lease of the Babcock Theatre in 1924. At that time Schine was operating in only seven towns. The Babcock Theatre is the only theatre in the town.

This town is not mentioned in the Opinion or Findings of Fact.

[fol. 5150] (F.M.) Carthage. (Population 4,207.) Carthage was the fourth town in which Schine acquired a theatre. This was in 1922 when Schine acquired the fee of the Strand Theatre. Schine also acquired at that time there, from the former owner, the lease of the Hippodrome Theatre, but that lease expired in 1929 at the time Fox-Metropolitan took over the Strand and the building was converted to commercial use. The Strand Theatre was destroyed by fire in March, 1945. Rebuilding has been delayed due to war time restrictions, but it is expected that a new theatre

* Wherever in any of the analyses contained herein the symbol (F.M.) appears before the name of a town, it means that the Schine Theatres in that town were leased to Fox-Metropolitan Playhouses in August, 1929 and reverted to Schine in the Fox-Metropolitan receivership in April, 1933.

will be ready for operation by the end of April, 1946. This new building will cost more than three times as much as the old building. The plaintiff has closely watched the Schine Circuit and must know these facts, but it has not mentioned them in the "Plan" and apparently expects Schine now to turn over to some other exhibitor a building which it has taken Schine over a year to complete. The Strand Theatre is the only theatre in town.

This is one of the towns mentioned in the Opinion and Findings of Fact.

Alleged Abuse: Finding of Fact No.

United Artists permitted ninety days clearance and R.K.O. permitted one hundred and twenty.

Facts. This alleged abuse is meaningless. It is not stated over whom the clearance was permitted, or whether it was ever exercised, and there is no evidence that any one ever complained about it.

[fol. 5151] East Rochester. (Population 6,691.) Schine acquired a lease on the Rialto Theatre in 1924, at a time when it was operating in only seven towns. East Rochester is a suburb of Rochester and the theatre is in fact a neighborhood theatre, subject to clearance from Rochester first-run downtown theatres. The Rialto Theatre is the only theatre in East Rochester.

This town is not mentioned in the Opinion or Findings of Fact.

[fol. 5152] Fairport. (Population 4,644.) Schine leased the Temple Theatre from the builder in November, 1926, and in 1928 Schine bought the real estate and improved the building and equipment. The Temple Theatre is the only Theatre in Fairport. Fairport, like East Rochester, is a suburb of Rochester. The theatre is in effect a neighborhood house and is subject to clearance from downtown Rochester.

This town is not mentioned in the Opinion or Findings of Fact.

[fol. 5153] Federalsburg, Maryland. (Population 1,369.) Schine acquired the fee of the Federalsburg Theatre in 1938 from several local businessmen. The deal was made concurrently with the deal for the theatres in Easton, *infra.*

The theatre had been built and was being operated by local business men as a matter of local pride and they were anxious to dispose of the theatre to an experienced operator. (See affidavit of Wheatley on motion for preliminary injunction.) The Federal Theatre is the only theatre in the town.

This town is not mentioned in the Opinion or Findings of Fact.

[fol. 5154] Hamilton, New York. (Population 1,790.) Hamilton is the site of Colgate University. Schine acquired the fee of the State Theatre in 1934. Prior thereto the theatre had been leased to the Smalley Circuit and upon the expiration of the lease Smalley told the owner that he was going to build a new theatre unless she would reduce the rent. Thereupon she came to Gloversville and induced Schine to buy the theatre. The owner was an elderly widow who is dead and whose testimony was not available at the trial, but the matter was litigated both in the New York State Supreme Court and before the N.R.A., and Schine was successful, in each forum. Schine spent a very large sum of money modernizing and improving the theater and was successful in more than doubling the attendance. The State Theatre is the only theatre in the town.

This town is not mentioned in the Opinion or Findings of Fact.

[fol. 5155] Hudson Falls, New York. (Population 6,654). Schine bought the fee of the Strand Theatre in July, 1935. Hudson Falls is a suburb of Glens Falls, which is only four miles away. The Strand Theatre is the only theatre in the town.

This town is not mentioned in the Opinion or Findings of Fact.

[fol. 5156] Hurlock, Maryland. (Population under 800.) Hurlock is a small town on the "Eastern Shore". Schine leased the Hurlock Theatre in 1938 as a part of the deal for the Wicomico Theatre, Salisbury. The only reason for leasing the theatre was that the former owner did not want to keep the Hurlock after disposing of the Wicomico. The Hurlock Theatre is the only theatre in the town.

This town is not mentioned in the Opinion or Findings of Fact.

[fol. 5157] Laurel, Delaware. (Population 2,277). In 1939 Schine leased the Waller Theatre from the Waller Estate. The theatre burned down in 1940 and Schine rebuilt it in 1941, spending for such purpose considerably more than the proceeds of insurance. The Waller Theatre is the only theatre in the town. Under Schine management the attendance at the theatre has shown a marked increase.

Although Ayers testified that Insley told him that he was foolish not to make a deal with Schine at Seaford because the Circuit had bought the Laurel Theatre, and might get away his product, the fact is that Ayers' theatres in Seaford got clearance over Laurel on all product except half of Warners.

[fol. 5158] Milford, Delaware. (Population 3,719). Schine bought the fee of the Plaza Theatre, Milford, from William Wilkins in 1939. Wilkins was an elderly butcher living in Wilmington. He had been advised by his attorney to dispose of the theatre (see affidavit of Wilkins on motion for preliminary injunction). After Schine acquired the theatre he was obliged to close it before running it because of structural weakness in the roof. Schine then made structural and decorative improvement, as a result of which when the theatre reopened there was a marked improvement in attendance. Milford is subject to clearance from Wilmington which is approximately seventy miles distant.

This town is not mentioned in the Opinion or Findings of Fact.

[fol. 5159] (F.M.) Newark, New York. (Population, 9,646), Schine acquired the fee of the Capital theatre in 1924 when Schine was operating in only seven towns. In 1926 Schine leased the Crescent Theatre which had been opened for a short time but was found not to be suitable for sound pictures and has been kept closed since Schine reacquired the town in 1933. Newark should be included among the two theatre towns.

This town is not mentioned in the Opinion or Findings of Fact.

[fol. 5160] Penn Yan, New York. (Population 5,308). Schine bought the Elmwood Theatre in 1936. This is the only theatre in the town.

This town is not mentioned in the Opinion or Findings of Fact.

[fol. 5161] Perry, New York. (Population 4,468). Schine bought the lease of the Auditorium Theatre from the Dipson Circuit in 1936. Previously Schine had negotiated for the lease of the theatre with Herzberger, the former operator, and had made a deal with Herzberger (Herzberger withdrew from the deal and sold to Dipson). The Auditorium Theatre is the only theatre in Perry. Perry is close to and in competition with Warsaw, which has two theatres, neither of which is operated by Schine.

This is one of the towns mentioned in the Opinion and Findings of Fact.

Alleged Abuse: (Findings of Fact 10 and 11 (f)) May told Herzberger that Schine was going to build a one thousand seat theatre there and a local newspaper article appeared to the same effect.

Facts: The Auditorium Theatre was an old out-moded opera house unsuitable for the needs of the town and Schine, therefore, decided to build a new theatre in the town. Schine had gone as far as getting blueprints for the theatre, but before bids were received Herzberger, who had previously agreed to sell his lease to Schine, sold it to the Dipson Circuit, which made substantial improvements in the old theatre. The theatre was then adequate for the needs of the town and Schine abandoned the plan to build. Later the Dipson Circuit sold the lease to Schine.

[fol. 5162] St. Michaels, Maryland. (Population 1,308). Schine leased the Marada Theatre in 1939. This is the only theatre in the town.

This town is not mentioned in the Opinion or Findings of Fact.

[fol. 5163] (F.M.) Saranac Lake, New York. (Population 7138). Schine bought the Pontiac Theatre in Saranac Lake. This town is competitive with Lake Placid, which is ten

miles away. The Pontiac is the only theatre in Saranac Lake.

This town is not mentioned in the Opinion or Findings of Fact.

[fol. 5164] Tupper Lake, New York. (Population 5,451): Schine leased the State Theatre in 1935. This theatre is competitive with the theatre at Tupper Lake Junction, approximately two miles away, and which is considered as being practically a part of Tupper Lake; except for the Tupper Lake Junction Theatre, the State Theatre is the only theatre in the town.

This town is not mentioned in the Opinion or Findings of Fact.

[fol. 5165] C

Two or More Theatre Towns

In this category (which is "B" of the plaintiff's "Plan"), the plaintiff has listed thirty-four towns in each of which Schine has two or more theatres and, according to the "Plan", the Circuit is required to dispose of all theatre interests except one theatre to be selected by the Circuit in each town. This would seem to leave the Circuit with thirty-four theatres in thirty-four towns, but a provision is made under "F" of the plaintiff's "Plan", which we shall discuss later, which would take away from the Circuit all of its theatres in ten of these towns so that the Circuit would then be left with twenty-four theatres in twenty-four towns.

Fourteen of these towns are not mentioned in the Opinion or the Findings of Fact, but no distinction is made between these fourteen towns and the twenty towns which are mentioned, in depriving the Circuit of its theatres.

Historically these towns fall naturally into certain classifications, to wit:

(1) Towns which were among the original acquisitions by Schine at a time when either there was no circuit at all, or the Circuit was so small that not even the plaintiff will contend that it had buying power sufficient to intimidate another exhibitor.

(2) Towns in which all the theatres have always been under the same management, either that of Schine or its predecessor.

(3) Towns in which there was originally only one theatre, but where Schine built a new theatre because the growth of the town demanded it.

[fol. 5166] (4) Towns which had one or more theatres which were inadequate to serve the needs of the town, and where Schine was induced by the residents to build a new theatre.

(5) Towns where there was at one time a theatre operated by an exhibitor other than Schine, which theatre was acquired by Schine by wholly legal and proper means.

(6) Towns where there *were* always was, or now is, an exhibitor other than Schine operating one or more theatres.

The foregoing will appear in detail from the historical analyses of the towns which follows, and it will further appear from such analyses that in no case has any theatre been illegally acquired, or illegally operated by Schine. Nevertheless the plaintiff seeks to reduce the holdings of the Circuit in these thirty-four towns to twenty-four theatres in twenty-four towns.

[fol. 5167] Detailed Historical Analysis

Amsterdam. (Population 33,329). In 1928 the Schine Circuit and the Shea Circuit each purchased a one-half interest in three theatres in Amsterdam (The Rialto, The Strand (fee) and The Regent (fee). At that time these theatres were the only theatres in the town. The buying, booking and management was handled by Shea. In 1935 Schine acquired Shea's interest, as a result of a buy or sell arrangement, in which Schine finally became the highest bidder. In 1931 Kroniek opened a small store show, known as the Orpheum Theatre. He had no lease and did not conduct a continuous business in the theatre, which lacked the customary facilities and conveniences, and was condemned by the city authorities in 1941. Amsterdam is in direct competition with Schenectady, a considerably larger city where The Fabian Circuit and R.K.O. operate theatres.

This is one of the towns mentioned in the Opinion and Findings of Fact.

Alleged Abuses: Finding of Fact 9B: United Artists permitted 90 days clearance at Amsterdam.

Finding of Fact 15: Non-competitive agreement.

Finding of Fact 18: Alleged refusal of MGM to negotiate with Kronick until Schine deal did not materialize.

Finding of Fact 19: Alleged refusal of Fox to sell Kronick in 1935-36 and alleged refusal of Warner in 1938-39.

The Facts: The United Artists clearance, as elsewhere, is meaningless. The non-competitive agreement is reasonable as to period and area involved. Kronick was not doing a continuous business. He had only a month to month lease in a theatre which he opened in a converted store many years after the town had been adequately supplied by the existing theatres. It is not strange that occasionally some distributors may have preferred not to sell him. No reasons for this alleged refusal are assigned.

[fol. 5168] Ashland, Ohio. (Population 11,141). Schine acquired an interest in The Palace Theatre (the best theatre in the town) in 1935. The other theatres were (1) an old Opera House, which was owned by the City; and (2) The Ohio, a small converted store show.

Schine acquired an interest in the lease of the Opera House in 1936, but in 1941 the theatre was condemned and the building reverted to the City, which dismantled the theatre. In 1937 Schine acquired the remaining interest in The Palace and in 1938 leased The Ohio Theatre. Later Schine built The Ashland Theatre, a new, modern theatre, which was opened in 1942.

Ashland is thirteen miles from Mansfield, Ohio, and the Warner Theatres there have clearance over Schine's theatres in Ashland.

This town is not mentioned in the Opinion or Findings of Fact.

[fol. 5169] Athens, Ohio. (Population 7,696). Schine bought the fee of the Athena Theatre in 1935. There were then two other theatres in the town (The Co[illegible] and The Ohio). They were converted store shows, each having less than 300 seats, and had been opened for only a short time. In 1936 these theatres were leased by Schine.

This town is not mentioned in the Opinion or Findings of Fact.

[fol. 5170] (F.M.) Auburn, N. Y. (Population 35,753). In 1923 Schine leased The Palace Theatre and the Old Opera House (now The Capitol). At that time Schine was operating theatres in only six other towns. There were then two other theatres in Auburn, The Jefferson and The Strand (an old and large auditorium which was then closed). As none of these theatres was a modern or an adequate theatre, Schine foresaw that it would be necessary at some time to build a new theatre, and, therefore, acquired a lot, upon which there was then located an old church, for such purpose. The Opera House lease expired in 1926. In 1927 Schine, then operating the Palace Theatre, and Shea, then operating The Jefferson Theatre, bought The Strand Theatre and made a new lease on the Opera House.

In the 1929 deal with Fox-Metropolitan that company took over The Palace, Jefferson and Strand Theatres, but refused to take the Opera House because it was an old upstairs house and also refused to permit Schine-Shea to operate the same. In 1931, while Fox-Metropolitan was operating the other theatres, Wallace leased the Opera House under the name of The Capitol Theatre. In 1933, The Palace, Jefferson and Strand reverted to Schine-Shea in the Fox-Metropolitan bankruptcy.

In 1933 the Strand was condemned by the city and closed. It was torn down in 1939. After The Strand was condemned Schine insisted on building a new theatre in Auburn because it was apparent that the town needed a new up-to-date theatre. Shea was unwilling to undertake the necessary expenditure and this difference of opinion resulted in Schine's purchase of Shea's interest in the Auburn theatres in 1937. Schine immediately entered upon the construction of The Auburn Theatre in Auburn on a lot which [fol. 5171] he had bought some fifteen years earlier. The theatre was completed and opened in 1938 and is generally regarded as the finest theatre in upstate New York, except for the large cities, such as Buffalo, Rochester and Syracuse.

This is one of the towns mentioned in the Opinion and Findings of Fact.

Alleged Abuses: Finding of Fact 9A: Deprived independents of RKO product for 1933-34.

Finding of Fact 12: After Schine opened a theatre in the town it was arbitrarily able to keep the independents from opening a theatre with suitable run product.

Finding of Fact 17: United Artists gave clearance in Auburn over Skaneateles.

Finding of Fact 18: RKO, Fox, Paramount, MGM and Universal refused to furnish second run at Auburn.

Finding of Fact 19: RKO would not sell independent in 1933-34. Paramount would not sell in 1935-36.

The Facts: Wallace did not come into Auburn until 1931 which was eight years after Schine had first leased the theatre, which is now the Capitol Theatre. Schine had been unable successfully to operate that theatre and Fox Metropolitan had refused to operate it. Nevertheless, Wallace, despite his complaints, has been able to obtain sufficient first run product to operate the theatre from 1931 up to the present time. Obviously, Wallace cannot buy all the product he wants because Schine with theatres far superior to the Capitol Theatre, is unable to obtain sufficient product for its own needs. Clearance between Auburn and Skaneateles has been arbitrated under Section 8 of the consent decree and 21 days was held to be reasonable by the Appeal Board. [fol. 5172] Bellefontaine, Ohio. (Population 9,543). In 1930 Schine was induced by a group of local citizens to build a new modern theatre in Bellefontaine. This theatre was opened early in February, 1931, as The Holland Theatre. It is a new, entirely modern theatre, of what is known as the atmospheric type, seating around 1,400 people.

At the time that Schine built The Holland Theatre, Schine had just disposed of all theatres formerly owned or operated by the Circuit except those in Cortland, Lockport, Geneva, Malone, Massena, Ogdensburg, a half interest with Shea in Amsterdam and neighborhood theatres in Buffalo and Rochester (including East Rochester and Fairport). At the time that Schine started to build in Bellefontaine, there were three other theatres in the town controlled by Milton A. Mooney, who was also the Warner Branch Manager in Cleveland. The theatres were old and inadequate for the town and only The Strand was operated continuously. The Majestic (250 seats) and no sound equipment had been operated only during the Annual Fair Week and was closed entirely from 1928 to 1931. The Opera House was a seventy-five year old upstairs theatre with no sound

equipment and it was never open except for an occasional stage show.

This is one of the towns mentioned in the Opinion and Findings of Fact.

Alleged Abuses: Finding of Fact 9A: Mooney lost Loew's product for 1930-31.

Finding of Fact 11A: During negotiations for the renewal of the Strand lease Lazar is claimed to have threatened to reopen the Opera House if Gutilla (the lessor) opened the Strand.

[fol. 5173] Finding of Fact 12: After Schine opened a theatre in Bellefontaine, it was arbitrarily able to keep independents from opening a theatre in the town with suitable run product.

Finding of Fact 19: Alleged refusal of MGM to sell independent in 1930-31 (this is the same as 9A).

Finding of Fact 24: Lynch wrote Fox asking that company not to sell to independent in Bellefontaine.

The Facts: When Schine opened the Holland Theatre in Bellefontaine it was the only Schine theatre in the state of Ohio, and Schine only had a few theatres in New York State. It had no circuit-buying power whatsoever. The desire of the distributors to deal with Schine was due entirely to the fact that the Holland theatre was a large, modern theatre with 1400 seats, and far and away the best outlet for their product in the town. Obviously, if the distributors could license their product to the Holland theatre (irrespective of who was operating it) it was desirable and profitable for them to do so in preference to any of the theatres which had previously operated in the town.

Lynch's request can be construed as nothing more than an attempt by Lynch to prevent fly by night operation.

[fol. 5174] Bucyrus, Ohio. (Population 10,027). Schine came into Bucyrus early in 1935, at the solicitation of a group of local businessmen who asked him to complete the construction of a theatre which had been attempted by other local interests, but abandoned because of lack of funds. The building had only the walls and steel work erected and was to be sold at a sheriff's sale. Schine purchased the property and completed a 1,100 seat modern brick and steel theatre building, with all modern conveniences, located in the heart of the city (the so-called "A" location). The theatre was opened in 1936.

At the time that Schine purchased the uncompleted Bucyrus theatre, the only other theatres in the town were the State Theatre, a small old-fashioned converted store show, which had been operated since June, 1934, by one, Milton Breyer, and the Southern Theatre, an old 450 seat house operated by Philip Charnas. Schine purchased the lease of the State Theatre in 1935 (the lease expired a few years later and was not renewed by Schine), and purchased the lease of the Southern Theatre in 1937.

This is one of the towns mentioned in the Opinion and Findings of Fact.

Alleged Abuses: Finding of Fact 9A: Independents were deprived of Paramount and Fox product for 1935-36.

Finding of Fact 9B: United Artists permitted 90 days clearance at Bucyrus.

The Facts: Charnas had refused to buy the Fox product when it was offered to him and was regarded as a bad account by Paramount for failure to pay bills. This was aside [fol. 5175] from the fact that Schine had just opened the new theatre in Bucyrus which was far superior to the other theatres in the town. The 90 day United Artist clearance is wholly meaningless, as it is everywhere it is mentioned in the findings.

[fol. 5176] Cambridge, Maryland. (Population 10,102). Early in 1938 the local businessmen, who owned the three theatres in Cambridge, put an ad in The New York Times offering them for sale. A representative of the Schine Circuit answered the ad, as a result of which Schine purchased the controlling stock in the corporation owning these theatres (The Arcade, The State and The Grand or Opera House). All three theatres are owned in fee.

The stockholders were local businessmen who had taken over the operation of the theatres as a matter of local pride and desired to dispose of them to an experienced operator. Schine immediately offered to purchase the stock of any other stockholder on the same terms as those having the controlling interest. (See affidavit of Brohan on motion for preliminary injunction).

Schine renovated and improved the theatres, as a result of which the attendance showed an immediate improvement.

This town is not mentioned in the Opinion or Findings of Fact.

[fol. 5177] (F.M.) Canandaigua, New York. (Population 8,321.) Schine acquired the fee of The Playhouse Theatre in Canandaigua in 1924, at a time when it was only operating in seven other towns. At that time The Playhouse was the only theatre in the town and it remained so until 1939 when Schine entered actively on the construction of a theatre which had been contemplated since 1937. The new theatre (The Lake Theatre) was completed and opened in 1941. It was built because of the fact that it was proposed to construct a large Veterans Rehabilitation Hospital in Canandaigua, which Schine thought would justify the existence of another theatre in the town.

This is one of the towns mentioned in the Opinion and Findings of Fact.

Alleged Abuse: Finding of Fact No. 10.

Schine made threats to build in "• • • Canandaigua by a signed newspaper article published and where he eventually did build."

The Facts: Schine started planning the construction of the new theatre as early as 1937 when it was first learned that the Veterans Hospital would probably be built in the town. The representative of the owners of the real estate, in which Wallace was interested, had no knowledge of Schine's plan and no such knowledge resulted in the rejection of Wallace's offer. (Testimony 4074-4079; 4626 to 4663.)

[fol. 5178] (F.M.) Corning, New York. (Population 16,212.) In 1924 (when Schine was operating in only seven other towns) Schine acquired The Liberty, State, Regent and Princess theatres in Corning, as a part of a single deal. The Princess Theatre was obsolete and was devoted to commercial use almost immediately after it was acquired.

When the deal was made with Fox-Metropolitan, Schine built the Fox Theatre to replace the Liberty, which had burned down, and sold The Regent (which was closed at the time) to Gerber, who remodeled it and operated it until 1938 when, because of poor health which shortly thereafter resulted in his death, he leased it to Schine. The only other theatre in the town is The Plaza, a small converted store theatre, operated for many years by Gaby M. Cohen.

The Theatres in Corning are subject to clearance in favor of the theatres in Elmira operated by the Warner Circuit, the Dipson Circuit and an independent.

This is one of the towns mentioned in the Opinion and Findings of Fact.

Alleged Abuses: Finding of Fact 9(A). Deprived or attempted to deprive competition of product.

Finding of Fact 9(B). Alleged unreasonable clearance.

Finding of Fact 14. Used cut-rate students tickets.

Finding of Fact 21. Bought-second-run product.

Finding of Fact 22. Contracts called for lower minimum admission than did independent contracts.

The Facts: As to 9(A) and 21, the product bought by Schine was only the product needed to operate the Schine theatres in Corning. Necessarily when a given product is given to one exhibitor, such product is not available to another exhibitor for the same run in the same territory. [fol. 5179] No evidence was furnished that any coercive measures were used by Schine in order to buy product for its theatres, and no evidence is offered to show that Schine bought product for any reason other than the fact that it was needed by the Schine theatres.

As to 9(B) it is stated that R.K.O. contracts in Corning permitted ninety to one hundred and eighty days clearance and Fox contracts permitted one hundred and sixty days. There is no evidence as to the theaters over which this clearance was granted, or that it was ever actually applied, or that anyone ever complained about it. The mere fact that there may have been a provision in some isolated contracts permitting this clearance, cannot be used even as cumulative evidence to show that Schine restrained interstate trade and commerce without proof that it was actually used with such motive.

Findings of Fact 14 and 22—certainly the fact that Schine allowed students to come to the Corning Theatre at reduced prices does not constitute restraint of interstate commerce. Changes in admission prices and the use of business stimplants *is* common to all motion picture theatres, whether circuit operated or individually operated, when weather or business conditions in the locality seem to the particular exhibitor involved to make them necessary.

[fol. 5180] Cortland, New York. (Population 15,881.) In 1926, at the invitation of local merchants, Schine built The State Theatre, a large, modern, fully equipped theatre, having over 1,600 seats. The town badly needed a new theatre and Schine spent well over a quarter of a million dollars for that purpose. At the time there were two old, inadequate theatres, The Temple and the Opera House, in fact, the Opera House was obsolete. Schine improved The Temple at a very considerable expense, so that it could be operated as the "B" house, and leased the Opera House property to Sears Roebuck.

Cortland is located between Ithaca and Syracuse, both of which cities draw to a certain extent from Cortland.

This town is not mentioned in the Opinion or Findings of Fact.

[fol. 5181] Delaware, Ohio. (Population 8,675.) In 1936 Schine acquired a half interest in The Strand Theatre, which was by far the better of the two theatres operating in Delaware at the time. The other theatre was the Star Theatre, operated under lease by John Buckman. The other fifty percent of The Strand Theatre was owned by Henry Bieberson, Jr., who originated the negotiations with Schine for the acquisition of their half interest. Buckman only had a month to month lease on the Star Theatre. He sent for Schine's representatives and arranged to sell his equipment and good will.

The Schine-Bieberson interests renovated and improved the Star Theatre and thereafter operated it at full or part time as conditions warranted (Delaware is a college town and while the college is open business is better than during the vacation periods). In 1940 Schine acquired Bieberson's remaining fifty percent interest.

The plaintiff took the depositions of Bieberson and Buckman just prior to the trial of this case but did not read either of them on the trial.

This town is not mentioned in the Opinion or Findings of Fact.

[fol. 5182] Easton, Maryland. (Population 4,528.) In November, 1938, Schine bought the fee of The Avalon Theatre (616) seats, and the lease of the Music Hall, an upstairs theatre of 250 seats, as a part of a single transaction. The

theatres had been operated by a group of local citizens who desired to sell, and who were told by Mayor Brohan and other Cambridge citizens that they had made a good deal with Schine (see affidavit of Wheatley on motion for preliminary injunction).

The Music Hall was operated as a "B" house for the benefit of the poorer residents of the town. The building in which the Music Hall was located was owned by the County and shortly after Schine came into the town the County arranged with WPA for remodeling and improvement thereof and asked Schine to give up its lease. Schine thereupon relinquished the lease, but saw that the town could still have a "B" theatre, acquired a new site and erected a new theatre at considerable cost to replace the Music Hall.

This town is not mentioned in the Opinion or Findings of Fact.

[fol. 5183] Geneva, New York. (Population 15,555.) In 1924 when Schine was operating only seven other towns, it acquired in a single transaction the fee of the Opera House; the fee of The Temple and the lease of the Regent Theatre. These were the only theatres in the town. The Opera House burned down in 1930 and Schine then built The Geneva Theatre to replace it. The Geneva was a fine new modern theatre, having almost 1,900 seats, and was opened in 1931. After The Geneva was opened, The Temple, which was obsolete, was closed, but with the improvement of business conditions it was extensively remodeled and reopened.

This is one of the towns mentioned in the Opinion and Findings of Fact.

Alleged Abuse: Finding of Fact 14. It is claimed that Schine cut admission prices in Geneva.

Finding of Fact 18. It is claimed that United Artists did not negotiate with De Toto for second-runs at Geneva, although Schine had bought second runs.

The Facts: As to 14. As has already been several times indicated changes in admission prices are seasonal only and are not used for the purpose of restraining interstate commerce.

As to Finding of Fact 18. United Artists offered to sell DeToto second-run product in Geneva in April, 1939, for

$15 to $25 per picture, but DeToto refused to buy the product, saying the price was too high. Later in 1939 DeToto attempted to buy the 1939-1940 product for second-run, but this deal was not completed, and for this reason, as well as for the fact that the first-run in Geneva had not as yet been sold. The Branch Manager told him that it was too early to discuss the deal with him; De Toto said he would come back when the theatre was ready, but never did so.

[fol. 5184] (F.M.) Gloversville. (Population 23,094.) This is the first town in which Schine acquired a theatre. This initial acquisition was the lease of The Hippodrome Theatre, an upstairs hall in one of the main streets of the town. The acquisition took place in 1917, at which time there were two other theatres in the town, to wit: The Glove, a newly constructed theatre, and The Family, an old opera house specializing in vaudeville. The Glove and The Family were operated by the same individuals.

In 1919 Schine bought the fee of The Hippodrome and enlarged and improved the theatre. In 1920 Schine bought The Glove and The Family Theatres. The Family Theatre was an old obsolete theatre and was converted to commercial use. A large part of it is used by Schine as part of the Circuit home offices. Since acquisition the Hippodrome and Glove have been renovated and improved by Schine several times.

The Glove and Hippodrome Theatres have always had competition from the Smalley Theatre, Johnstown, operated by the Smalley Circuit (a circuit of about seventeen theatres). The Smalley Theatre is only three miles from the Glove and Hippodrome Theatres, and although Johnstown and Gloversville are separate towns, they are contiguous interrelated communities.

This is one of the towns mentioned in the Opinion and Findings of Fact.

Alleged Abuse:

Finding of Fact No. 17: "Gloversville got clearance of forty-five days over Johnstown.

The Facts: This clearance which had already been voluntarily reduced to 30 days was further reduced to [fol. 5185] 21 days in a clearance proceeding under Section 8 of the Consent Decree in United States v. Paramount. Schine voluntarily appeared.

In holding 21 days clearance to be reasonable, the Arbitration Board necessarily held that Gloversville and Johnstown were competitive. In the course of the argument on February 25, 1946, the following colloquy took place between defendants' counsel and the Court:

> "Mr. McClennen: Now this suggestion of your Honor's brings forcibly forward Gloversville; Here was a man with nothing, starting a theatre on a shoe string there. That operation has gone on for twenty-eight years. Is he to be charged with having put his money into that enterprise for the purpose of monopolizing trade?
>
> "The Court: No, I don't think so."

[fol. 5186] Herkimer, New York. (Population 9,617.) In 1925 Schine acquired a half interest in the only two theatres in Herkimer (Liberty Theatre fee and Richmond Theatre lease). This interest was acquired from local business men who were then operating these two theatres and the two theatres in Little Falls, which were acquired in the same transaction; the other fifty percent was owned by Universal Pictures, but later on when Universal Pictures decided that the exhibition business was unprofitable and was disposing of all of its theatre interest, Schine bought the other fifty percent interest,

This is one of the towns mentioned in the Opinion and Findings of Fact.

Alleged Abuses: Finding of Fact 9(B). Clearance for Herkimer over Ilion. "Schine got clearance for Herkimer over Ilion where non-existed before."

The Facts: This finding is incorrect. The record shows that clearance for Herkimer over Ilion was instituted during the Fox-Metropolitan operation and after Schine reacquired Herkimer this clearance was educed.

[fol. 5187] Ilion, New York. (Population 8,927.) In a transaction started in December, 1936, and culminating in May, 1937, Schine acquired from the same interests the fee of The Capitol Theatre and the lease of The Temple Theatre in Ilion, New York. They were the only theatres in the town. Ilion had been previously operated by Fox-Metropolitan but reverted to the former owners at about the same time as the Schine Theatres came back to Schine.

This is one of the towns mentioned in the Opinion and Findings of Fact.

Alleged Abuse: Finding of Fact 15. Non-competitive agreement.

The Facts: This agreement was reasonable as to time and areas covered.

[fol. 5188] Kent, Ohio. (Population 8,581.) Schine acquired a lease on The Opera House at Kent, Ohio, in June, 1936, and operated that theatre until September, 1937, when the theatre had to be closed because of lack of product.

In December, 1937, Schine bought The Kent Theatre from the Flanagan interest, which also operated the two theatres in Ravenna (which two theatres were acquired by Schine in the same transaction).

Kent is nine miles from Akron, and is subject to fourteen days clearance from the theatres operated by the Warner, Shea and RKO Circuits, and a theatre operated by an independent.

This is one of the towns mentioned in the Opinion and Findings of Fact.

Alleged Abuses: Finding of Fact 9(B). United Artists gave ninety days clearance at Kent.

The Facts. It is assumed, since the statement appears in the opinion, that at least one contract was introduced at the trial relating to Kent, which had a ninety day clearance provision. Obviously this provision was never operative.

[fol. 5189] Lexington, Kentucky. (Population 45,736.) In 1936 Schine acquired a majority of the stock of Phoenix Amusement Company from the stockholders, who were local businessmen. At that time Schine was not operating any theatres in Kentucky. Phoenix Amusement Company operated the Ben Ali, Kentucky, Strand and State Theatres in Lexington. It also operated the only theatre in Paris and the only two theatres in Richmond, Kentucky.

Later Schine acquired the Opera House, Lexington, and the Ada Meade, Lexington (both subsequent run houses). Under the Consent Order of May, 1942, Schine agreed to endeavor to sell these two last named theatres, but the terms on which they were acquired were so favorable to the seller that they refused to take them back, and no other exhibitor was found either during the pendency of the

order, or since, who was desirous of acquiring them at those terms.

This is one of the towns mentioned in the Opinion and Findings of Fact.

Alleged Abuses: Finding of Fact 9B: United Artists gave 90 days clearance at Lexington.

Finding of Fact 14: "Schine cut admission prices" in Lexington.

Finding of Fact 15: Non-competitive agreement.

Finding of Fact 19: MGM would not sell Schwartz in Lexington in 1936-37.

Finding of Fact 22. In the 1936-37 season Schine is claimed to have cut admission prices for first run showing of Fox pictures below the minimum fixed in the contract. In reply to an inquiry by Fox, J. M. Schine replied that the [fol. 5190] cuts "were quite essential and proved to be beneficial." Thereafter, Fox omitted minimum admission prices in second and third run contracts, but provided for a fifteen cent minimum evening adult admission price for Schwartz.

The Facts: The non-competitive agreement with Schwartz was reasonable both as to period of time and area involved. Any difficulty that Schwartz had in obtaining product was occasioned only by the competitive situation in Lexington and by his unwillingness to pay the prices asked by the distributors. He was always able to obtain sufficient suitable product to operate his theatre.

It will be noted that the changes in admission prices in Lexington occurred only during the summer season when the temperature is extremely high. Any benefit which Schine might have derived from changes in admission prices was necessarily also beneficial to the distributor.

[fol. 5191] (F.M.) Little Falls, New York. (Population 10,163.) In 1925 Schine acquired a half interest in the two theatres in Little Falls from the local businessmen who were operating these two theatres and two theatres in Herkimer. The other fifty percent was owned by Universal Pictures, but later when Universal Pictures decided that the exhibition business was unprofitable and disposed of its theatre interest, Schine bought the other fifty percent interest both in Herkimer and in Little Falls.

The local citizens who sold to Schine had other business interests to which they desired to devote their entire ener-

gies. During the Fox-Metropolitan tenancy the Hippodrome lease expired and was not renewed, but Schine made a new lease on this theatre in 1936 and has since operated it part time.

This is one of the towns mentioned in the Opinion and Findings of Fact.

Alleged Abuses: Finding of Fact 9B: RKO, Columbia and Universal permitted 120 days clearance, and United Artists permitted 115 days.

The Facts: There is no evidence this alleged clearance was ever operative.

[fol. 5192] Lockport, New York. (Population 24,379.) In 1922 Schine acquired The Temple Theatre, Lockport. Prior to 1922 Schine was operating in only three towns. At that time the only other theatre operating in Lockport was the Hi-Art, which was a converted store show.

In 1924 Schine purchased from the same man who had owned The Temple a large building across the street from The Temple, which had formerly been a skating rink, but which was then being used as a garage. Schine completely rebuilt the building into a large modern theatre (The Rialto) with 1,500 seats, 1,400 of which were on the ground floor. At about the same time a group of local citizens undertook the construction of a new theatre (The Palace) and in connection with the transaction in 1924 when Schine acquired a number of theatres, Schine also acquired a preliminary lease on The Palace Theatre. However, this lease was repudiated and the building was leased to Paramount, which company also held a lease on the Hi-Art, but was not operating it.

Hi-Art was remodeled and rebuilt into a much larger and better theatre so that there were then three good theatres in the town, together with Schine's Temple, which was the oldest and least suitable for a theatre.

In 1927 or '28, Schine and Paramount combined theatre operations in Lockport. At that time they closed the Hi-Art and The Temple was torn down. In 1932 the Dickinson interests, who controlled the corporation owning the Palace Theatre succeeded in ousting Paramount-Schine and immediately formed an affiliation with the Dipson Circuit to operate The Palace, which they continued to operate until

1936. When Schine lost The Palace Theatre, The Hi-Art was reopened as the Schine "B" house in Lockport. [fol. 5193] Dickinson died in 1933 and in 1935 his executors sold The Palace Theatre at public auction. The property was purchased by the Dipson Circuit. Subsequent to this the Dipson Circuit sold The Palace Theatre to Schine at a considerable profit over what it had paid the Dickinson Estate for the property.

This is one of the towns mentioned in the Opinion and Findings of Fact.

Alleged Abuses: Finding of Fact 11(E). Alleged statement by May immediately after ouster of Schine from Palace, "* * * If they could not lease The Palace, they would have to reopen the Hi-Art to use up product under contract." Alleged difficulty on part of independents in obtaining product from Metro, Fox, Universal and Loew's.

Finding of Fact 12: "After Schine opened a theatre within a town it was arbitrarily able to keep the independents from opening a theatre in the town provided with suitable run product as in * * * Lockport * * *."

Finding of Fact 13: Claim that Schine was able to monopolize first-run product at Lockport, although physical facilities of the independents in the town were better than Schine's.

Finding of Fact 19: Alleged refusal on the part of RKO to sell product to Lockport in 1933-34; Paramount 1933-34; Universal 1933-34.

Finding of Fact 21: Purchase by Schine of second-run product.

The Fact: When Schine was ousted from The Palace Theatre, it had already contracted for the 1932-33 product, and The Rialto was using the product of all major companies, except Metro. The only reason Schine was not [fol. 5194] using Metro product at that time was because there had been a serious disagreement with Schine, which disagreement was subsequently eliminated. Charles Dickinson, Jr. admitted that Schine was a regular customer of the eight major companies; The Palace had a franchise for Columbia Pictures, first-run, for 1934-1935 and 1935-1936, and played United Artists first-run product in 1934, 1935, and 1936. The Palace Theatre refused to buy Fox product second-run.

Findings of Fact 12 and 13 are not correct. Schine was operating a theatre in Lockport before The Palace Theatre was built and at no time after The Palace Theatre was acquired by Dickinson and Dipson Circuit did Schine use more or different product that it was using prior to such acquisition. Although The Palace Theatre was a larger theatre than The Rialto, The Rialto had a better location and more seats downstairs and was, therefore, better adapted for the showing of motion pictures.

[fol. 5195] Maysville, Kentucky. (Population 6,572). Schine leased the Russell Theatre in June, 1938. The other two theatres in town were the Washington, operated by Kaplan and Frisch, and the Hollywood operated by another exhibitor. Kaplan and Frisch acquired the Hollywood, and shortly thereafter made a deal with Schine for a part interest in all three theatres. Schine subsequently purchased a one hundred percent interest.

This town is not mentioned in the Opinion or Findings of Fact.

[fol. 5196] Middlesboro, Kentucky. (Population 11,777). In January, 1939, Schine acquired the lease on the Mannering and a lease on the Brownie Theatres from the same exhibitor. Thereafter, and after Schine had made extensive improvements to each building, Schine acquired the fees.

This town is not mentioned in the Opinion or Findings of Fact.

[fol. 5197] Ogdensburg, New York. (Population 16,346). In 1926 Schine leased The Strand Theatre and The Pontiac Theatre from the same individuals, who had previously operated the same, and who were also interested in the operation of two theatres in Malone. These are and always have been the only theatres in the town.

This is one of the towns mentioned in the Opinion and Findings of Fact.

Alleged Abuses: Finding of Fact 14. Cut admission prices.

Finding of Fact 17. Warner's Branch Manager told Home Office Canton would do more business "if it were not for thirty days clearance for Schine at Ogdensburg

over Canton, and if it was reduced it will make a better condition for us all * * *"

The Facts: As to 14. As there never was any other theatre in Ogdensburg, a change in the admission prices could not affect interstate commerce in any way.

As to 17. The clearance between Ogdensburg and Canton was arbitrated under Section 8 of the Consent Decree in *United States* v. *Paramount*. As a result of such arbitration, clearance was reduced to three days. In making such reduction the Board held that the towns were competitive, but that three days clearance would be adequate. Schine acquiesced in that decision.

[fol. 5198] (F.M.) Oneonta. (Population 11,731). This is the second town in which Schine acquired a theatre or theatres. Schine leased The Strand Theatre, which was a small poorly constructed theatre in 1919, very shortly after he started operating in Gloversville. At that time the best theatre in Oneonta was operated by a circuit (the Hathaway Circuit). Schine bought this theatre in 1922 (at that time Schine was operating only in Gloversville, Oneonta and Norwich).

In 1923 the Palace Theatre was built and leased to Schine (at that time Schine was operating in Gloversville, Oneonta, Norwich, Carthage and Oswego). Schine bought the fee of The Palace Theatre in 1927. When the theatres of the town were leased to Fox-Metropolitan that company refused to lease The Strand Theatre because it was obsolete and unsatisfactory for a theatre; the theatre was thereafter sold and converted by the purchaser to commercial use.

This town is not mentioned in the Opinion or Findings of Fact.

[fol. 5199] (F.M.) Oswego. (Population 22,062). Schine acquired The Strand, Capitol and Richardson Theatres as a part of a single deal in Oswego in 1922. Prior to 1922 Schine was operating theatres in only three towns; the Strand and Capitol were operated full time and the Richardson was operated from time to time.

The land upon which the Oswego Theatre was built was acquired in 1937. The Oswego Theatre is a large, modern theatre costing over a quarter of a million dollars, seating over 1,700 people, and was opened in January, 1941. All

of the theatres in the town were operated by Fox-Metropolitan from 1929 to 1933.

This town is not mentioned in the Opinion or Findings of Fact.

[fol. 5200] Paris, Kentucky. (Population 6,204). When Schine acquired 97% of the stock of the Phoenix Amusement Company from Lexington businessmen in 1936, that company was the lessee and operator of The Bourbon Theatre, the only theatre in the town. Schine soon decided that Paris needed a new, modern theatre, and in 1937 purchased the necessary land and obtained the necessary building permit. In the spring and summer of 1938 Schine had plans drawn for and obtained bids for the construction of the new theatre which was completed and opened as The Paris Theatre in 1939.

This is one of the towns mentioned in the Opinion and Finds of Fact.

Alleged Abuses: Findings of Fact 11B and 15: Lazar is said to have told Schwartz if he built in Paris, Schine would build a 1200 seat theatre in Lexington. When Schine acquired Schwartz's Paris and Lexington interests Schwartz signed a non-competitive agreement.

Finding of Fact 12: After Schine opened a theatre in Paris, it was arbitrarily able to keep independents from opening a theatre there with suitable product.

Finding of Fact 18: Alleged refusal of Fox, RKO and Universal to negotiate at Paris.

The Facts: As to Findings of Fact 11B and 15: Schine made no "threats" to build in Paris. He decided to build a new theatre in the town shortly after he acquired the Bourton Theatre and went through with those plans expeditiously. The plans were initiated before there was any intimation that Schwartz contemplated building. Schine announced its intention to build in the summer of 1937 and Schwartz did not lease the property until November, 1938. [fol. 5201] There is no evidence in the record that any one ever told Schwartz that Schine would build a new 1,200 seat theatre in Lexington. As a matter of fact, the only exhibitor who would have been injured by a new the-

atre in Lexington would have been Schine, who then was operating all of the first-run theatres in the town.

The non-competitive agreement which Schwartz signed is believed to be wholly proper, both as to time and area, and has not been the subject of complaint from anybody except the plaintiff. Schwartz had an opportunity (under the Consent Order of May, 1942) to reacquire the theatre in Lexington which he had leased to Schine, but the terms which he had obtained were so favorable that he had no desire to take back the theatre, nor has anyone else indicated willingness to take it under these terms.

As to Findings of Fact 12 and 18: Schwartz's request for product was made in November, 1938 after the 1938-39 product had been sold. RKO and Universal told Schwartz that they might be able to sell him some product after his theatre was completed. Grady (Fox) said about the same thing in a conversation. All three mentioned the fact that Schine was building a new theatre in Paris.

Schwartz testified at the trial that his dealings with Schine were met only with courtesy and fair discussion of negotiations; that no threats were made to him; that he made his two deals for Paris and the Opera House, Lexington because he thought they were good business deals; and that Paris was not large enough for three theatres.

[fol. 5202] Piqua, Ohio. (Population 16,049). Schine leased The Piqua Theatre, The Miami Theatre and The Bijou Theatre in Piqua, Ohio, in May, 1931, as a part of a single deal. This was during the period that most of the New York theatres previously operated by Schine were being operated by Fox-Metropolitan, and Schine was in only one other town in Ohio (Bellefontaine).

Although Piqua is twenty-nine miles from Dayton, the R.K.O. theatres and a theatre operated by an independent there are given clearance over Schine's theatres.

This town is not mentioned in the Opinion or Findings of Fact.

[fol. 5203] Ravenna, Ohio. (Population 8,538). In 1937, Schine bought The Ravenna and Ohio Theatres in Ravenna, Ohio. They were purchased as a part of a single transaction with the owner of The Kent Theatre in Kent, Ohio, which was purchased at the same time. The Ohio Theatre had been closed for some time prior to its acquisition by Schine,

but had to be incorporated in the deal. Subsequently business conditions improved and The Ohio was renovated and opened for operation.

Ravenna is subject to clearance in favor of the Warner, Shea and R.K.O. Circuits and also an independent theatre in Akron. Ravenna has always played after Kent.

This town is not mentioned in the Opinion or Findings of Fact.

[fol. 5204] Richmond, Kentucky. (Population 7,335). When Schine acquired the stock of Phoenix Amusement Company, that company owned The Madison Theatre and leased The State Theatre in Richmond, Kentucky, which were, and are, the only operating theatres in the town. Schine made improvements to The Madison Theatre.

This town is not mentioned in the Opinion or Findings of Fact.

[fol. 5205] Salamanca, New York. (Population 9,011). In 1924 when Schine was operating in only seven other towns, Schine acquired a lease upon the Andrews Theatre. In 1927 Schine decided to build a new theatre in Salamanca and acquired a site therefor. When the Andrews Theatre was sub-leased to Fox-Metropolitan, Schine agreed to build and lease to Fox a new theatre on a site acquired by it in 1927. Business conditions got bad and neither Fox nor Schine wanted a new theatre in the town at the time and the agreement was cancelled.

After The Andrews reverted to Schine in the Fox-Metropolitan bankruptcy, Schine began to consider the construction of a new theatre, but conditions did not justify such construction until 1938, at which time preparation of plans was started. These plans were completed in 1939, but due to war conditions the theatre was not completely built and opened until August, 1942.

This is one of the towns mentioned in the Opinion and Findings of Fact.

Alleged Abuse: Finding of Fact No. 10.

> "In Salamanca, just as independents acquired a site for a contemplated theatre, through the press Schine announced its intention to build."

The Facts: As appears from the above recital, Schine intended to build a new theatre as far back as 1927. This determination was not in any way influenced by the acts of any other exhibitor. Performance was held up by bad business conditions, but when business conditions justified it the theatre was built.

[fol. 5206] Seneca Falls, New York. (Population 6,452). Schine leased the Strand Theatre in 1935, and at that time The Seneca Theatre was operated by DeToto, who had a month to month lease from the bank which owned the property and was desirous of selling the same. Schine purchased the property from the bank in 1936. At the time of the purchase, DeToto, who had been offered the property by the bank, and had refused to buy it, had removed the equipment.

This is one of the towns mentioned in the Opinion and Findings of Fact.

Allegel Abuses: Finding of Fact 9(B). "At Seneca Falls, New York, Columbia and United Artists permitted 120 days" (clearance).

Finding of Fact 11(I). Alleged attempt to prevent DeToto from building new theatre in Seneca Falls by announcing prospective reopening of Seneca Theatre.

The Facts: It is possible that isolated Columbia and United Artists contracts contained provisions with respect to 120 days clearance, but these provisions were never operative.

As to Finding of Fact 11(I), the evidence clearly shows that DeToto never made a bona fide attempt to build a new theatre in Seneca Falls and, further, that he never had money either of his own, or others, sufficient to finance any such project.

[fol. 5207] Tiffin, Ohio. (Population 16,102). In 1932 Schine acquired a half interest in the leases on the Ritz Theatre and Grand Theatre from their then operators, who retained the remaining fifty per cent interest. In 1938 Schine and its partners acquired the lease on the Tiffin Theatre.

This is one of the towns mentioned in the Opinion and Findings of Fact.

Alleged Abuse: Findings of Fact 9(B). "United Artists gave ninety days clearance in Tiffin."

The Facts: While this clearance may appear in one or more isolated contracts, there is no evidence that it was ever operative.

[fol. 5208] (F.M.) Watertown, New York. (Population 33,385). In January, 1927 Schine leased the Avon (1376 seats), and the Olympic (1649 seats). Later, after the Fox-Metropolitan operation, Schine acquired the Palace (594 seats). In 1924 Vournakis commenced to operate the Strand and in 1933 acquired the Liberty theatre. There is also the Victoria theatre, operated by Graham and Ludlow.

This is one of the town- mentioned in the Opinion and Findings of Fact.

Alleged Abuses: Finding of Fact 9A: Independent is claimed to have lost Warner second run 1934-35 product.

Finding of Fact 9B: United Artists permitted 90 days clearance at Watertown.

The Facts: In an affidavit sworn to on September 20, 1939 Vournakis said, among other things, "that I have been in the theatre business in Watertown for twenty years and that a great portion of that time I had been operating and still operate two theatres in opposition to the Schine theatres in that city, and during the entire period, I have never experienced any unpleasantness and at no time have I had any difficulty in obtaining the pictures I wanted to buy. I have always found that their theatres were conducted in a businesslike manner on a fair competitive basis." When Vournakis testified at the trial he confirmed the truth of the statement in said affidavit.

The 90 day United Artists clearance again is meaningless.

[fol. 5209] Wooster, Ohio (Population 11,543). In July, 1931, Schine acquired a half interest in the Wooster Theatre. At that time most of the New York theatres previously operated by Schine were being operated by Fox-Metropolitan and Schine was operating in only two towns in Ohio, Bellafontaine and Piqua. The only other operating theatre in the town was a converted store show, which was closed by the operator in 1932 and reconverted to commercial purposes.

In 1933, Schine and others leased the Opera House and tried to operate it, but the theatre was old and obsolete and,

therefore, in 1937, a new site was acquired on which the new Wayne Theatre was constructed and opened in 1938.

This town is not mentioned in the Opinion or Findings of Fact.

[fol. 5210] D

Theatres Which Were Originally Listed in the Consent Order of May 19, 1942, and Which Schine Still Owns

On page 4 of the memorandum submitted in support of its "Plan" plaintiff criticizes defendants' performance under the consent order and makes the charge that the defendants deliberately failed to comply with the order. Furthermore the plaintiff claims that this deliberate failure to comply has continued for four years after the entry of the order.

There is absolutely no basis for this charge, but it is typical of the plaintiff's attitude throughout this entire case. The plaintiff is fully aware of the fact that the consent order was originally intended to remain in force only until May 19, 1944. Thereafter it was extended by order of the Court and consent of the parties until Nov. 15, 1944, at which time it finally terminated and since which time it has been of no force or effect whatsoever. During the period that the order was in force the defendants rendered periodical reports setting forth their efforts to dispose of the theatres mentioned in the order and, during this period, although the plaintiff at times complained that not all of the theatres had been sold, no charge was ever made that the failure of the defendants to sell all of the theatres was deliberate and willful. This charge was fully answered before this Court which found that the defendants had made considerable and reasonable efforts to sell.

In this connection we deem it advisable to refer to the comment of the Court made during the argument of February 25, 1946, and appearing at page 82 of the transcript, where the Court was evidently thinking about the provisions [fol. 5211] of the consent order in relation to the sixteen theatres named therein. Lest the Court should get any impression that the defendants willingly agreed to dispose of these theatres because they felt that it would assist the competitive situation, or because there was anything improper in connection with their acquisition, we state emphatically

that the order itself shows on its face that the disposition of these theatres was insisted upon by the plaintiff so as to restore the status of the Schine Circuit to what it was at the time of the institution of this action, and the order itself further shows expressly that no wrong doing of any kind was conceded by the defendants or asserted by the plaintiff.

The attention of the Court is invited to the excerpt from the transcript of the proceedings before this Court on May 19, 1942, which is noted in our brief, dated February 23, 1946, at page 5 (footnote).

It appears that there are four theatres and an interest in a fifth theatre named in the order which Schine still holds. Detailed statements regarding these situations are set forth *infra*. The case of the Strand theatre, Cumberland, was fully argued before the Court at the time that the Liberty theatre, Cumberland, was acquired after a hearing before this Court. The Court then ruled that the defendants should be permitted to acquire the Liberty theatre, and that they need not continue to endeavor to sell the Strand theatre. Grace Fisher, the present owner of two theatres in Cumberland, appeared at the hearing and testified that she had made an offer for the Liberty theatre to prevent its purchase by a company other than Schine. On learning that Schine was a prospective purchaser, she asked to withdraw her offer and the deposit made on it, and expressed her willingness that Schine make the purchase. Her "A" theatre is the same type of theatre, and plays the [fol. 5212] same type and run of motion pictures as the Strand and Liberty.

The interest in the Memorial Theatre, Mount Vernon, Ohio, consisted of a lease which only had a short time to run and which has now expired. As the plaintiff well knows, this building is owned by the County Commissioners of Knox County, Ohio, and the lease is put up for competitive bidding every few years, so that no one is able to guarantee long term occupancy of the building.

In the case of the Margie Grand Theatre, Harlan, Kentucky, Leon Scott the owner of the remaining 50% opposed any change in the set-up so vigorously (and without in any way being influenced by Schine) that it is not difficult to see why there was no purchaser for Schine's interest. Leon Scott appeared for this purpose at the hearing held in this Court on April 10, 1944, and stated in open court that he was very happy in his relationship with Schine

and did not desire to have any one else associated with him in the operation of the theatre. This theatre is in active competition with the New Harlan, operated by Price Coomer.

In the case of the Opera House and Ada Meade Theatres, Lexington, Kentucky, and the Plaza Theatre, Malone, New York, the terms upon which Schine acquired these theatres were so favorable to the sellers that it was impossible to find another purchaser who would duplicate the terms. In Malone, Boumansour notified the Department of Justice that he had disposed of his theatre on a basis entirely satisfactory to him. The non-competitive agreement was proper as to length of time and area covered and was particularly appropriate as Boumansour entered Schine's employment at that time.

[fol. 5213] E

Suburban or Neighborhood Theatres in Rochester, New York

Out of the 10 neighborhood theatres (but not including Fairport and East Rochester) operated by the Schine Circuit in Rochester, New York, the plaintiff asks the Court to order Schine to sell either the Riviera or Liberty Theatre, and either the Monroe or Madison Theatre. The explanation of this suggestion, which appears on page 3 of the memorandum accompanying the "Plan" does not make sense. Schine admittedly does not control any first run theatres in the City of Rochester. The first-run theatres are all downtown and are operated by Loew's-Comerford and Paramount, and R. K. O. Loew's, Paramount and R. K. O. were once defendants in this case and still are in *United States* v. *Paramount* in the Southern District of New York.

The Riviera and Liberty Theatres were acquired by Schine in 1926 from different owners and during the twenty years in which they have been operated by Schine there never has been any complaint about the manner of their acquisition or their operating policy. The Monroe and Madison Theatres were acquired in February, 1939, from one, Fenyvessy, who had been operating theatres in Rochester for thirty years and who was then 84 years old and actively desirous of disposing of his theatres. They had always been operated by Mr. Fenyvessy under one man-

agement so that the change of ownership did not affect the competitive situation as between these two theatres. There is no reason why any of the four theatres should be sold.

[fol. 5214] The alleged abuses referred to in the Opinion and Findings of Fact relate (9A) to an isolated instance in which some exhibitor did not buy Columbia product; (11H) involving the Webster theatre, which was planned and eventually built between the State theatre (a Schine theatre) and the Plaza theatre (an independent theatre), (Schine claimed that the district could not stand a third theatre, but it was built and eventually taken over by one of the original promoters); and (12) a claim that Schine was able to monopolize first neighborhood run, although the physical facilities of the independent were better.

The fact is that the neighborhood theatres operated by Schine were far and away the best neighborhood houses in Rochester. The above complaints were not made about, nor do they affect the Riviera, Liberty, Madison or Monroe theatres which are proposed to be sold.

Incidentally in the *Crescent* case the plaintiff expressly excluded from the charges, from any evidence, and from any prayer for relief a large number of suburban theatres operated by Crescent in Nashville, Tennessee. There is no reason why the same policy should not apply here.

[fol. 5215] F

Pooling Arrangements

The plaintiff lists eight towns (exclusive of Syracuse, New York), in which it asks the Court to order the dissolution of "existing pooling arrangements" by the sale of the defendants' stock in the respective corporations operating the theatres there.

The term "pooling arrangement" is universall recognized in the motion picture industry as meaning a situation where Exhibitor "A" and Exhibitor "B" each operate one or more theatres in a given locality and mutually agree to combine their operations.

Only two of the towns listed by the plaintiff (exclusive of Syracuse) fall within this definition, to wit: Fostoria and Medina.

1. In Norwalk, Schine acquired a two-thirds interest in the corporation operating the Forum Theatre. Subse-

quently this corporation built the Norwalk Theatre and acquired the Moose Theatre. There never was a theatre operating pool in the town.

2. In Shelby, Ohio, Schine acquired a half interest in the Costamba Theatre. Subsequently they offered to sell back this half interest to the other 50% owner who, however, did not want to buy. There never has been a theatre operating pool in Shelby.

3. In Ballston Spa, Granville, Mechanicsville and Whitehall (four small one-theatre towns in the vicinity of Albany, New York) Schine acquired as a part of a single transaction [fol. 5216] a half interest in the four theatres. There never has been a theatre operating pool in any of these towns.

This leaves Fostoria, Ohio and Medina, Ohio (in addition to Syracuse, New York) as towns in which Schine had an interest in a so-called "pooling arrangement."

4. In Fostoria, Schine was operating the Civic and Roxy Theatres and Arthur and Ural Buck operated the State Theatre. The Buck brothers testified at the trial. Arthur Buck was anxious to retire from the theatre business and the Bucks accordingly approached Schine with a view to forming a partnership in Fostoria. An arrangement was made which has at all times proven satisfactory to the Bucks, who have so emphatically expressed themselves. No evidence was offered indicating that anyone else was in any way damaged or even effected by this arrangement.

5. In Medina, Yudelevitz and Willis were operating the Princess Theatre, which was the only theatre in town. They interested Schine in the theatre and succeeded in selling Schine a 50% interest. At that time it was contemplated that they would build a new theatre in the town because the Princess Theatre had only 350 seats. They then learned that Fine and Essick, who were substantial circuit operators (they operated some twenty-nine theatres in the vicinity of Cleveland) were planning to build a new theatre in the reconstructed Masonic Lodge. As the town could not stand three theatres, the Yudelevitz-Schine interests abandoned their plans for the construction of a new theatre and made extensive improvements to the Princess Theatre. After the new Temple Theatre was open the various parties entered into an arrangement under which the two theatres were [fol. 5217] leased to a new corporation and in which Yudele-

vitz had 25%, Schine 25% and Fine and Essick 50%. Essick and Fine testified as to these negotiations and found no fault with the manner in which they were conducted by Schine. The operation of the town since the arrangement was made has been wholly satisfactory and no one in or outside of the town has made any complaint about it.

Other than as set forth above the plaintiff has not furnished another detail regarding the mechanics of the so-called "pools" in Fostoria or Medina.

If all of the facts regarding these so-called "pooling arrangements" were disclosed, it would immediately appear that they cannot be dissolved simply by the sale of the stock interest of the Schine Circuit in the operating corporations, if any. In each case there are rights, privileges and obligations appertaining to each party to the so-called pool which cannot be abrogated without the consent of the other party.

6. With respect to Syracuse, the plaintiff suggests that the existing arrangement should be terminated by the sale of Schine's interest in S. K. E. Operating Co. and the return of Schine's theatres to the defendants for separate operation. R. K. O., which is the other stockholder in S. K. E. Operating Co., was originally a defendant in this case, but was dismisseed as a defendant by the plaintiff. Irrespective of the merits of the proposal, it is impossible to achieve the result desired by the plaintiff without the presence before this Court of R. K. O., as would readily appear if the entire structure of the corporation and the nature of its holdings were before the Court, which they are not.

Furthermore, there cannot be any justification for seeking a dissolution of S. K. E. Operating Co., when it is in [fol. 5218], direct competition in Syracuse with Loew's, Inc., which, we believe, is unanimously conceded to be the most powerful single producer-distributor-exhibitor in the industry, and even more significantly, when Schine has nothing to do with the buying and booking for the S. K. E. theatres and when the corporation which does handle the buying and booking has been dismissed as a defendant in this case at the request of the plaintiff.

[fol. 5219] Detailed Historical Analysis

Norwalk, Ohio. (Population 8,211). In 1935 Schine acquired a two-thirds interest in the corporation holding the lease on The Forum Theatre (537 seats), which theatre

had been opened in December, 1935. At that time the only other theatre in the town was The Moose Theatre, operated by The Elks, and managed by one Felter. The Moose was an old opera house, constructed in 1904 and located down an alley. In 1936 the corporation acquired The Moose Theatre and as the stockholders, after trying to operate the two theatres, found them to be inadequate for the town, the corporation built The Norwalk Theatre (1,111 seats), a large modern theatre which was completed and opened in 1941.

This is one of the towns mentioned in the Opinion and Findings of Fact.

Alleged Abuses: Finding of Fact No. 9(B). United Artists permitted 90 days clearance in Norwalk.

Finding of Fact No. 10(C). Just before Schine acquired The Forum Theatre in Norwalk Lazar advised that an independent to "get in with us; we are a big company; you know what it means if you are not in with us; and further stated, 'if you lease your theatre Mr. William Sellman (part owner of The Forum) will walk out of town.' "

The Facts: Finding of Fact 9(B). The isolated clearance provision in a United Artists contract is wholly meaningless and there is no evidence that it was ever operated.

Finding of Fct 10(C). This cannot be regarded as anything more than conversation on the part of Lazar, Schine having no theatre in the town at the time, obviously it would not influence the independent one iota. Furthermore, there is no proof of Lazar's authority to make the statement if he did make it.

[fol. 5220] Shelby, Ohio. (Population 6,653). In 1937 Schine acquired a fifty percent interest in the lease of The Castamba Theatre. At that time the only other theatre in Shelby was an old upstairs opera house. As a part of the deal the theatre was improved and the seating capacity increased from 476 seats to 749 seats.

There had been an article in The Film Daily that the Dipson Circuit was going to build a new deluxe modern theatre in the town. Shortly after interest was acquired by Schine in The Castamba Theatre, Kempar, a former employee of Dipson, whose letterheads represented himself as a circuit operator, converted a garage into a motion picture theatre, known as The State Theatre, with 454 seats. Kempar subsequently acquired the lease of the opera house; subse-

quently Kempar sold his interests to the Gregory interest who operate theatres in other towns.

This town is not mentioned in the Opinion or Findings of Fact.

Ballston Spa, New York.	(Population 4,443).
Granville, New York.	(Population 3,173).
Whitehall, New York.	(Population 4,851).
Mechanicsville, New York.	(Population 7,449).

These are four small towns, in each of which there was one theatre. The towns are located generally in the district surrounded by Saratoga Springs, Glens Falls, Schenectady, Albany and Troy, all of which are large cities and in each of which, *except Saratoga Springs and in each of which,* except Saratoga Springs and Troy, there are distributor-exhibitor-circuit operated theatres. In Troy the first-run theatres are run by the Fabian Circuit.

[fol. 5221] These four theatres were formerly operated one hundred percent by William Benton, an exhibitor of long standing, who, in 1939, in a single transaction sold a fifty percent interest to Schine, with an agreement as to a division of the managerial and booking duties. Benton and Schine each put up a considerable sum of money for the purpose of improving the theatres.

None of these towns are mentioned in the Opinion or Findings of Fact.

[fol. 5222] Fostoria, Ohio. (Population 13,453). In 1936 Schine acquired the lease of The Civic Theatre (516 seats) and the lease for The Roxy Theatre (280 seats) from the same individual. At that time the only other theatre in the town was The State Theatre operated by Arthur and Ural Buck and other local people. In 1937, at the request of the Bucks, Schine and the Bucks formed a corporation to operate the three theatres, in which corporation the Buck interests owned fifty percent and Schine owned fifty percent.

This is one of the theatres mentioned in the Opinion and Findings of Fact.

Alleged Abuses: Finding of Fact 9(B). United Artists permitted 90 days clearance at Fostoria.

The Facts: There is no evidence as to when, or against whom, this isolated incident of clearance was granted, or that it was ever operated.

[fol. 5223] Medina, Ohio. (Population 4,359). In 1937 the only theatre in Medina was The Princess Theatre, which was owned and operated by Willis & Yudelevetz. Early in 1937 they asked Schine to take an interest in the theatre and also in the construction of a new theatre which they wished to build in the town (The Princess Theatre had only 350 seats). Schine thereupon acquired a 50% interest in The Princess Theatre and agreed to contribute its share toward the construction of a new theatre.

The original agreement between Schine and Yudelevetz was signed on March 18, 1937.

Some time in the same month, the Masonic Lodge of Medina, decided to reconstruct their building and to include in such reconstruction a theatre. They thereupon wrote to Schine asking Schine not to go ahead with the plan to build a new theatre. Schine and Yudelevetz then learned that the Fine and Essick Circuit (a substantial circuit operating about thirty theatres in the vicinity of Cleveland), were planning to lease the new theatre in the Masonic Building. This lease was finally made on January 18, 1938, and the new theatre was opened shortly thereafter.

When Schine and Yudelevetz became convinced that Fine and Essick actually intended to go forward with the theatre in the Masonic Building, they abandoned their plans to build a new theatre and remodeled The Princess at a considerable cost.

Before The Temple Theatre was opened, The Princess Theatre had all the first-run product that the theatre could use in Medina. The Princess Theatre and The Temple Theatre were operated in opposition to each other until April, 1939, when the operation was taken over by a corpo-[fol. 5224]ration, in which the Fine-Essick interests owned fifty percent; Schine owned twenty-five percent and Yudelevetz owned twenty-five percent.

This is one of the towns mentioned in the Opinion and Findings of Fact.

Alleged Abuses: Findings of Fact 10 and 13.

Finding of Fact No. 10: "In Medina Schine announced the making of an agreement to erect a new theatre immediately after independents started construction."

Finding of Fact No. 13: Schine was able to monopolize first-run product at Medina even though the physical facilities of the independent in that town were better than Schine's.

The Facts: Neither of the above statements is correct. As appears from the evidence Schine made an agreement with Yudelevetz before Schine knew of the intention of Fine and Essick to come into the town and, when satisfied that such intention was genuine, the plan to build a new theatre was abandoned. Construction of The Temple Theatre, although contemplated in March, 1937, was not commenced until months later.

With respect to the product situation, the evidence clearly showed that before Schine came into the town, and while the independents, Yudelevetz and Willis were the only operators, they had all the first-run product they could use from the first-run company. If product was taken away from any one by any one, it was taken away by Fine & Essick from Schine and Yudelevetz.

[fol. 5225] (F.M. as to Eckel Theatre only). Syracuse, New York. (Population 205,967). In 1927 Schine acquired a half interest in the lease of the Eckel Theatre, Syracuse. Subsequently Schine acquired a one hundred percent interest in the operation of this theatre. After the theatre reverted to Schine in the Fox-Metropolitan bankruptcy, it was in competition in downtown Syracuse with Loew's State Theatre, and The Keith Strand and Paramount Theatres operated by R.K.O.

Schine and R.K.O. formed a corporation, to which were leased or sub-leased, the Keith Paramount, Strand and Eckel Theatres. R.K.O. was the majority stockholder and did the buying and booking. When the Strand lease expired, the R.K.O.-Schine Company renewed the lease for a short period but had to give up the theatre, which is now operated by Loew's as a "moveover" Theatre.

Aside from the fact that it would be impossible to cancel any of the leases or sub-leases on these theatres without

the consent of S.K.E. and R.K.O., neither of whom are parties to this action, the subsequent run situation in Syracuse would not be in any way changed by the reversion of the Eckel Theatre to Schine. The only effect would be that the Eckel Theatre with 1,200 seats and little or no product would be forced to compete with R.K.O. and Loew's.

This town is not mentioned in the Opinion or Findings of Fact.

[fol. 5226] Towns Within a Radius of Approximately 25 Miles from Each Other

In this category (which is "F" of plaintiff's "Plan"), the plaintiff has listed eight so-called areas in which the defendants operate in two towns, and one area (No. 7), in which the defendants operate in three towns.

Out of all the theatres now operated by the defendants in these nineteen towns, the plaintiff says that the defendants may keep only nine. The reason for this appears on page 3 of plaintiff's accompanying memorandum, where the plaintiff says that since the application of "A", "B", "D" and "E" would leave the defendants with fifty theatres out of the well and legally operated Circuit which they now have, it is necessary to devise an artificial scheme which the plaintiff choose to call "Area Competition" in order to deprive the defendants of still more theatres.

"Area Competition", according to the plaintiff, means that any two towns within a radius of twenty-five miles from each other, are necessarily competitive. No such proposition has ever been advanced, much less accepted, in the motion picture industry. Any practical exhibitor in the business knows that competition may exist within a radius of as much as seventy miles (viz., the first run theatres in Wilmington, Delaware, take clearance over theatres on the so-called Eastern Shore for a distance of seventy miles), whereas there may be no competition between theatres as close together as three to five miles.

Each one of the towns mentioned in this subdivision of the plaintiff's "Plan" is also mentioned under "B". Therefore, by the time this provision was put into effect, a situa-
[fol. 5227] tion would exist in these nineteen towns where Schine would be operating only one theatre, and some other

exhibitor would be operating all of the other theatres now owned by Schine in each such town. Nothing further should be required to demonstrate the wholly unscientific, unbusinesslike and unfair nature of the proposal, and also to demonstrate that the only object which the plaintiff has in submitting this "Plan" is reduce the Circuit to a point beyond which even the plaintiff does not dare venture.

The detailed historical analysis with respect to each of these towns is covered under "B" of this Section IV. Here we shall simply set forth the facts regarding the areas designated by the plaintiff as competitive areas.

[fol. 5228] Area 1. Kent and Ravenna, Ohio. There are two theatres in each of these towns, but one of the theatres in Kent is closed. The three theatres which are now operating full time were owned and operated by the same interests for years before Schine acquired them. These two towns are suburbs of the City of Akron and subject to clearance in favor of the theatres in that city. Within the twenty-five mile radius set up by the plaintiff, there are the following towns: Bedford, Alliance, Warren, Segring, Cuyahoga Falls, Akron, Wadsworth, Barberton.

[fol. 5229] Area 2. Ashland and Wooster.

These towns are 22 miles apart. Ashland is 13 miles from Mansfield and subject to clearance in favor of the theatres there which are operated by Warner and by an independent.

Wooster is nearer Massillon and usually plays after the theatres there.

Within the 25 miles radius fixed by the plaintiff are the following towns: Mansfield, Gallion, Lodi, New London, Wellington, Plymouth, Shelby, Crestline, Loudonville, Orville, Wadsworth, Rittman, Massillon, Shreve, Barberton and Millersburg.

[fol. 5230] Area 3. Bucyrus and Tiffin.

These towns are 26 miles apart and therefore do not fall within the plaintiff's arbitrary theory of "Area Competition". Bucyrus is subject to clearance in favor of the Paramount theatres in Marion and Tiffin is nearer to Fremont and Findlay, and usually plays after the theatres there.

Within the 25 mile radius fixed by the plaintiff are the following towns: Mansfield, Marion, Gallion, Plymouth,

Willard, Carey, Upper Sandusky, Cardington, Mt. Gilead, Bellview, Clyde, Fremont and Findlay.

[fol. 5231] Area 4. Cambridge and Easton, Maryland. Cambridge is a canning town on the Eastern Shore of Maryland, almost wholly dependent on the activity of the Phillips Canning Company (the owner of the trade-mark "Phillip's Delicious) for employment. It is almost entirely an industrial town. Easton is on the other side of the Choptank River, which is very wide at the point, and is about fifteen miles upstream. It is a non-commercial town and contains many summer homes owned by people living further north. The theatres in Cambridge were formerly owned by local businessmen of the town who sold them to Schine as a result of an advertisement they placed in The New York Times. The theatres in Easton were formerly owned by local business men of that town, who sold them to Schine because the Cambridge people told them they had gotten a good deal from the Circuit. Schine has materially increased the attendance at the theatres in each of these towns over the average attendance while they were separately operated.

[fol. 5232] Area 5. Lexington and Paris, Kentucky. Lexington and Paris were both formerly operated by the Phoenix Amusement Company (a company controlled by local stockholders), and when Schine acquired the stock of this company it naturally took over the operation of the two towns. At that time Paris had only one theatre, but Schine saw that the town needed another theatre and accordingly built a fine new theatre there. Lexington has a population of 45,000 people, whereas Paris has only 6,000 inhabitants. Within the twenty-five mile radius set up by the plaintiff, there are the following towns: Cynthiana, Millersburg, Georgetown, Sadieville, Frankfort, Versailles, Midway, Wilmore, Nicholasville, Richmond, Winchester, Lawrenceburg Mt. Sterling, Sharpsburg, Nichols, Mt. Olivet.

[fol. 5233] Area 6. Amsterdam and Gloversville. Although these two towns are within twenty-five miles of each other, they are not directly competitive. Amsterdam is on the direct railroad line from Albany to Chicago and on the Erie Canal, whereas Gloversville is eight miles from the railroad in the Foothills of the Adirondacks. Gloversville's competition comes from the Smalley Theatre in Johnstown (a cir-

cuit operated theatre), which is located within three miles of the two theatres in Gloversville and has always been in very close competition with them. Amsterdam's competition comes principally from Schenectady, where RKO and The Fabian Circuit operate. Within the twenty-five mile radius set up by the plaintiff there are the following towns: Schenectady, Saratoga, Scotia, Broadalbin, Northville, Johnstown, Fonda, Canajoharie, Fort Plain, St. Johnsville.

[fol. 5234] Area 7. Ilion, Herkimer and Little Falls. Prior to their acquisition by Schine in 1925, Herkimer and Little Falls had always been operated by the same interests, i.e., local businessmen. From 1929 to 1933 these two towns and Ilion were operated by Fox-Metropolitan Playhouses, Inc. When Fox-Metropolitan went bankrupt operation of Herkimer and Little Falls reverted to Schine and the operation of Ilion reverted to the former owner, who, however, apparently tired of operating theatres and sold Ilion to Schine. All three towns are close to Utica; Ilion, ten miles; Herkimer, thirteen miles; Little Falls, twenty miles; and the Warner theatres in Utica are granted clearance over Herkimer and Ilion. Within the twenty-five mile radius set up by the plaintiff there are the following towns: Fort Plain, Canajoharie, St. Johnsville, Utica, Dolgeville, Frankfort, Poland, Richfield Springs, Waterville, Oriskany.

[fol. 5235] Area 8. Auburn and Seneca Falls. Auburn already has competition within the town itself. Seneca Falls is in active competition with Waterloo which is operated by another circuit. Within the 25 mile radius fixed by the plaintiff are the towns of Syracuse, Baldwinsville, Camillus, Marcellus, Weedsport, Clyde, Lyons, Waterloo, Geneva, Moravia, Phelps, Wolcott and Penn Yan.

[fol. 5236] Area 9. Geneva and Canadaigua. These two towns have always been operated by the same interests. Prior to their acquisition by Schine they were operated by a corporation known as Associated Theatres. These theatres were acquired in 1924 when Schine was only operating in seven towns. At that time Canandaigua had only one theatre, but Schine built another theatre there in 1939 because of the contemplated construction of a large Veterans Hospital there. From 1929 to 1933 Fox-Metropolitan operated Canandaigua and Schine operated Geneva. Geneva had been included in the deal under which Fox-Metropoli-

tan acquired Canandaigua, but Fox rejected the title to one of the Geneva theatres. Metro gives Rochester clearance over Canandaigua. Within the twenty-five mile radius fixed by the plaintiff are Waterloo, Seneca Falls, Clyde, Lyons, Palmyra, Phelps, Newark, Clifton Springs, Penn Yan, Naples.

Detailed Historical Analysis is covered under IV C (pp. 35 to 77, *supra*).

[fol. 5237]

V

The Terms of Sale, the Proposed Appointment of a Trustee and the Proposed Powers and Compensation of the Trustee Are Unprecedented, Improper, Illegal and in Violation of the Fifth Amendment to the Constitution.

It is believed that the plaintiff cannot cite a single instance in the history of the Sherman Act where any such wholesale destruction of a sound business has been ordered or permitted by the Court, irrespective of the extent or magnitude of a violation of the Act by the defendants in such case. In this case, the worst that could possibly be charged against the defendants under any construction of the evidence is, that in building up and conducting their business in the same manner as that pursued by countless others, without interference by the Government, since the industry was first started, they may have done something which may now be considered to be in violation of the Sherman Act, the recurrence of which in the future should be prevented by the Court. No proof whatsoever either of intent or motive has been offered. This is the limit for which the plaintiff can contend in this case and is not, of course, conceded by us to represent the proper or even remotely justifiable result to be arrived at from the evidence presented.

Nevertheless the plaintiff asks the Court to turn over to a so-called trustee having unspecified qualifications, a business which the defendants have painstakingly built up over a period of thirty years, starting with an original investment of only $1,500, giving to such trustee *carte blanche* with respect to the disposal of properties owned by the defendants with no restriction whatsoever on the terms [fol. 5238] of sale, method of sale, expenses to be incurred,

or the trustee's compensation, except the approval in certain instances by the Court.

With respect to the approval of the Court the "Plan" provides that this is limited in the case of terms of sale to a disapproval by the Court of a sale which might not effectuate the purpose of the "Plan," or which might result in an unreasonable restraint of competition. There is no provision for disapproval by the Court in the event that it finds the purchase price inadequate, or the terms of sale otherwise unfair to the defendants. The whole provision is confiscatory to the nth degree. Furthermore, the Court is directed to determine the trustee's compensation based upon the number and rapidity of sales made by him. Thus, the faster he sells the property, the larger will be his compensation irrespective of the loss suffered by the owners. Every inducement is given the trustee to sell to the first rather than the highest bidder.

The visitorial power granted to the trustee are such as to render the defendants' business, even as to such theatres as they may be permitted to retain, wholly worthless.

There is no provision for payment of any moneys to the defendants, but any such provision would probably be meaningless because under the "Plan" proposed there would be no money left for the defendants.

[fol. 5239]

VI

Booking Agencies

The plaintiff asks the Court to enjoin the defendants from buying or booking motion pictures for any theatres other than those in which they hold a financial interest.

In the Opinion and in the Findings, it is stated that at the time this suit was brought the Schine Circuit was buying and booking for twenty-seven theatres. It is not stated whether it is contended that the theatres for which Schine was booking, or any of them were or were not theatres in which Schine had a financial interest. This information was apparently obtained from the answers to Ints. 17(B) and 17(C). An examination of these answers shows that all of these booking arrangements which are still in force, cover theatres in which Schine has a financial interest, with the exception of the Rustic Theatre, at Sacandaigua Park, New York, which is a summer theatre near Glovers-

ville, and where Schine gets $250 a season for taking care of the film service.

Furthermore, with respect to booking arrangements in force at the time the suit was instituted, but which have since expired, Schine had a financial interest in all of these theatres with the exception of Big Stone Gap, Virginia. (Incidentally the owner of the theatre defaulted in his performance of the contract.)

[fol. 5240] VII

Restrictions on Schine Expansion

The plaintiff seeks inclusion in the final judgment of a provision that no defendant shall acquire a financial interest in any additional theatres, except after an affirmative showing that such acquisition will not unreasonably restrain competition.

We concede that there is such a provision in the Crescent decree. However, in contrast to the provision in the Crescent decree is the entirely different provision contained in the Consent Decree in the *United States* v. *Paramount*, which provided:

"XI. • • •

"(5) For a period of three years following the entry of this decree, no consenting defendant shall enter upon a general program of expanding its theatre holdings. Nothing herein shall prevent any such defendant from acquiring theatres or interests therein to protect its investment or its competitive position or for ordinary purposes of its business. Proceedings based on a violation of this subdivision (5) shall be only by application to the Court for injunctive relief against the consenting defendant complained against, which shall be limited to restraining the acquisition, or ordering the divestiture, of the theatres or interests therein, if any, about to be acquired, or acquired, in violation of this Section."

While this provision of the Consent Decree was still in full force and effect, some of the consenting defendants acquired numerous theatres and successfully resisted an attempt by the plaintiff, in the Court where the action was

pending, to force them to divest themselves of these new acquisitions.

[fol. 5241]

VIII

Summary of the Effect of Plaintiff's "Plan"

In order to evaluate what the plaintiff is really seeking to accomplish by means of its "flexible", "only partial dissolution of the circuit" it is only necessary to summarize what would be left of the Schine Circuit if the Court were to accept the plaintiff's "Plan" (a possibility which we find it difficult to contemplate) and if the "Plan" could be put into practical operation (which we do not believe to be legally possible).

As evolved by the plaintiff this is what would be left of the Circuit.

1. Under page 2 of the plaintiff's memorandum
   (a) 2 suburban theatres in Buffalo
   (b) 2 theatres in Glens Falls
   (c) 1 theatre in Norwich
   (d) 2 theatres in Salisbury

2. Under "A" of plaintiff's "Plan"
   No theatres

3. Under "B" & "F" of plaintiff's "Plan"
   24 theatres in 24 towns.

"B" purports to leave the defendants 34 theatres but "F" takes away 10 of these.

4. Under "C"
   No theatres

[fol. 5242] 5. Under "D"
   8 suburban theatres in Rochester.

6. Under "E"
   The Eckel Theatre, Syracuse, N. Y.—a 1200 seat downtown theatre which would be in competition with R.K.O. and Loew's.

Thus, all that would be left of a business that has taken 30 years to build, by laborious, industrious, efficient and (as we contend) wholly legal methods would be 38 theatres of which 10 would be suburban theatres and 1 (the Eckel) would be more of a liability than an asset.

The foregoing demonstrates more forcibly than any argument that we can make that what the plaintiff seeks to achieve in this litigation is not the restoration of competition in localities where it is claimed to have existed previously—but a monument to a new philosophy and interpretation of the Sherman Act—not warranted by any precedent or by the existence of any conditions disclosed by the evidence in this case. To accomplish this the plaintiff is quite willing to destroy at one blow the fruits of the labors of innocent parties accumulated over a period of 30 years.

[fol. 5243]

IX

The Results Which the Court Indicates Should Be Obtained in This Litigation Can Be Attained Without Requiring the Sale by the Defendants of a Single Theatre.

A discussion of this point is, of course, without prejudice to our basic position that no violation of the Sherman Act has been proved in this case, and that no judgment against the defendants, or any of them, is warranted. Anything that we may say under this heading regarding the possibility of curing alleged abuses, or the possible fixing of certain conditions under which the defendants would continue to do business, is subject and subordinate to that basic position and subject to the arrival at a complete solution of the entire problem which will not involve any conditions other than those hereinafter discussed and which specifically would not involve the sale or other disposition of any theatres.

Keeping the foregoing always in mind, we suggest the following possible remedies for the alleged abuses referred to by the Court in its Opinion, Findings and Judgment.

[fol. 5244]

A

Alleged Excessive Circuit Buying Power

This alleged abuse is the one upon which the Court seems to have placed the greatest emphasis. The Court attributes this buying power to the fact that the Schine Circuit is claimed to have combined "open" and "closed" towns in its dealings with the distributors. The Opinion also states that Schine was accustomed to buying product for theatres not owned or occupied by it. This, the Court says, brought

about and increased the ability of Schine to dictate terms to the distributors. The Court also stated that in one single season (1939-1940) Schine paid film rental of $1,647,000 to six film companies.

Of course, the above alleged abuses, and all other abuses mentioned in the Opinion and Findings occurred prior to May 19, 1942. No violation of the Act since that date has been claimed or could be proved. Any abuse which may have resulted from combining "open" and "closed" towns, in making deals with distributors, was eliminated by the provisions of the Consent Order of May 19, 1942, under which the Schine Circuit agreed to buy separately for its "open" towns and its "closed" towns. We repeat here the excerpts quoted on pp. 21 and 22 of our brief, dated February 25, 1946.

> "In presenting the consent order to the Court on May 19, 1942, counsel for the plaintiff said among other things:
>
> (Minutes of May 19, 1942, page 6)
>
> 'Mr. Wright: I think it goes further than the consent decree in the other case. One of the allegations [fol. 5245] in the complaint here, if your Honor recalls, is that the——
>
> The Court: The combination.
>
> Mr. Wright: Yes. In substance this prevents the Schine Circuit from combining its closed towns with these competitive situations in making film licenses.'

It thus appears that if there had been any combined buying for open and closed towns in Schine's deals with the distributors prior to May 1942, as indicated in the Court's opinion, this practice definitely stopped with the entry of the consent order.

At the opening of the trial on May 19, 1944, Mr. Wright stated among other things as follows:

(Reference T. 40-41)

> 'Mr. Wright: Of course it is perfectly true that in so far as these franchise agreements are concerned, for example, you will recall that the temporary order that was entered in May, 1942, avoided those franchises, discontinued those contracts, so that

in accordance with what is stated here there is no continuing conspiracy in so far as licensing contracts are concerned which have been terminated, and, we assume, of course, that during the period of our temporary order the order was obeyed. That is, that order prohibited, as you recall, the defendants from combining competitive situations and licensing film in dealing with any distributors. So that I should say it is clear from this statement and the entry of the order that the conspiracies that we rely upon between each of the distributors and Schine continued up to the date of the entry of that order on May 19, 1942.

Mr. McKay: I am not sure whether I understood you, Mr. Wright. You mean they stopped with the entry of the order on May 19, 1942?

[fol. 5246] Mr. Wright: I presume so. The purpose of the order was, of course, to preserve the status quo pending the continuance of this suit, and I assume that the order was obeyed. As it was the continuance of the conspiracies was not permitted by the order, of course, and I assume it didn't occur. But the evidence which we will offer will not go beyond that date. As we understand it, the situation was effectively, let us say, frozen or suspended as of the entry of that order, and our evidence will, in any event, be confined to the prior period. And that is what I assume he is principally interested in knowing.' "

With respect to the authority of Schine to buy and book for theatres not owned or operated by it, we have already pointed out that all of Schine's existing booking contracts at the present time are made with theatres in which it has a financial interest, with the exception of the summer theatre at Sacandaigua Park, New York, and that the same observation applies to all contracts in force at the time of the commencement of this litigation. (There was a contract with the Big Stone Theatre, Big Stone Gap, Virginia, running from May, 1940 to February, 1941. Schine had no financial interest in this theatre except an option to purchase a one-half interest. It received a total compensation of $208.36 for its services under the contract and the theatre owner defaulted in performance thereof.) It is,

therefore, not a correct statement to say that Schine's buying power has been increased because it buys for theatres in which it has no financial interest.

The sum of $1,647,000, represents, we concede, a substantial film rental, but we believe that investigation will [fol. 5247] show that there is at least one single theatre in New York which pays annually a film rental in excess of this amount.

Irrespective of the extent of the buying power of the Circuit, there is no evidence in the case to show that this buying power was used to purchase pictures which were not needed by the Circuit for exhibition in theatres operated by it, or to purchase pictures at prices lower than those which a competing theatre was willing to pay. Therefore, the fact that in certain instances when Schine had a contract for product, a competing exhibitor was unable to obtain the same product for the same run, cannot, standing alone, be cited as a violation of the Sherman Act.

While the segregation of buying power as between "open" and "closed" towns, as provided by the Consent Order was entirely satisfactory from May, 1942 to May, 1944, and should be a satisfactory solution now, if it is felt that further precautions are necessary, it might be possible, subject to the reservations above set forth, further to decentralize the Circuit film buying by handling the licensing of films for the defendants' theatres separately in the exchange centers respectively serving the defendants' theatres.

Neither of these suggestions would require the sale of a single theatre with the resultant destruction of a substantial enterprise which the defendants have built up over a period of thirty years by laborious, industrious and wholly honest business methods.

[fol. 5248]

B

Clearance

This alleged abuse seems to be the second in importance in the Opinion of the Court and in the Findings.

As we have already pointed out in our brief, dated February 25, 1946 (pp. 13-15, 19 and 26, 27 and 28), there is no evidence in this case that any of the clearances referred to in the Opinion and Findings were in fact unreasonable.

An analysis of some of the clearances, to which reference is made, would show that they meant absolutely nothing. The Statement and Finding of Fact 9(b) that Schine got clearance from Herkimer over Ilion where none existed before is wholly erroneous. The record shows (T. 3500 to 2, Exs. 874, 878) that clearance was first granted to Herkimer over Ilion during the time when Fox-Metropolitan operated both towns. This clearance was fourteen days. Later when Schine reacquired Herkimer and Young and Whitney reacquired Ilion, the clearance was reduced to ten days.

Irrespective of any of the foregoing, there is now in existence machinery especially designed and effectively operating to handle all disputes regarding clearance. We refer to the arbitral system set up under the Consent Decree in the Southern District of New York and supervised by the American Arbitration Association. Reference to this system is made on pp. 26 and 27 of our brief, dated February 25, 1946.

In submitting the arbitration provisions of the Consent Decree to the Court in the *Paramount* case, Asistant Attorney General Hayes, representing the *United States*, said:

> [fol. 5249] "And I may say in that connection that it has long been felt, both by exhibitors and by distributors, that there is no fairer way to handle and dispose of complaints concerning clearance then to have the clearance fixed by some impartial arbitrator, and that is precisely what is accomplished by Section VIII. • • • Those of us who have worked on this decree after reviewing, as I said at the very beginning, the numerous industry problems in all their ramifications with the government representatives keeping constantly before their eyes, as was their duty, the complaints of exhibitors and the complaints of public groups, are of the opinion that the decree is a desirable forward step. We believe it will work. We believe it will produce good. We recommend the decree to your Honor."

Purely for the limited purpose of demonstrating to the Court that that system is operating effectively, we print in the Appendix hereto the testimony of J. Noble Braden, Secretary of the American Arbitration Association given in

U. S. v. *Paramount*, and we hand the Court herewith a copy of Ex. 390, prepared by the American Arbitration Association, and submitted to the Court in that case.

As a practical matter, since the institution of this system, the Schine Circuit has voluntarily participated in the arbitration proceedings in every case where one of its theatres was involved. A formal consent by Schine to continue this practice in the future would furnish an effective and expeditious manner of disposing of all clearance disputes in which any of the Schine theatres might be involved.

In order to anticipate any objection on the part of the plaintiff that only the so-called Big Five are bound by subject to the reservation set forth above, it would be possible to provide that any clearance fixed by the arbitrators [fol. 5250] in any proceeding involving Schine and any one or more of the Big Five would be the clearance to prevail on all contracts involving the distributor parties to such arbitration, irrespective of the distributor. If this were not satisfactory, it would be possible to provide, subject again to the above reservations, that any clearance disputes between a Schine theatre and another theatre where the distributor was not one of the Big Five should be settled by arbitration under the rules of the American Arbitration Association.

[fol. 5251]

C

Franchises

The Court attributes a considerable part of the advantage which it finds that Schine had over so-called independents to the fact that Schine was in the habit of making franchises (i. e., film contracts covering a period of more than one year) with the various distributors.

Although much has been said in the Opinion and in the Findings to the effect that Schine was able to obtain "concessions not obtainable by independents" because of the existence of these franchises, there does not appear in the record a single instance where a so-called exhibitor was unable to obtain the same provisions in his contract as were to be found in the Schine contracts *if he had asked for the inclusion of these provisions.* Nor does there appear in the record any instance where an exhibitor—a so-called independent—was unable to make a franchise agreement with a

distributor for any product that was open for his theatre, if he so desired. The record shows that in making franchise agreements no distinction is made between large circuits and independent exhibitors operating only a few theatres and more franchises have been issued to the latter than to the former, (T. 2468, Exs. 741 to 744; T. 1166, 4457, 4488, 4614, Exs. D-47, D-48, D-123 to 129; T. 1170). Any failure on the part of a so-called independent to license motion pictures under franchises, or to obtain in his film contracts provisions similar to those found in the Schine contracts, was due not to his inability or to superior circuit buying power on the part of Schine, but to his own ignorance, or indifference.

Irrespective of the foregoing, all of the franchises held by the Schine Circuit were voided by the Consent Order [fol. 5252] of May 19, 1942 and, subject to the above stated reservations, it would be possible to provide that no franchises shall be made in the future. Any such provision would, of course, have to be subject to a further provision that if licensing by franchise again became prevalent in the industry, then the Schine Circuit would be permitted again to license films under franchises to the same extent as other exhibitors.

[fol. 5253]

D

Other Alleged Abuses

The Opinion and Findings and Conclusions mention other alleged abuses, but these do not appear either prevalent or important, if the remedies suggested under "A", "B" and "C" are put into operation:

1. Presumably it will be conceded that business stimulants, such as Bank Nights, Bingo, Two-for-One, China Give Aways, etc., were wholly the result of the depression starting in the early 1930s, and have now almost entirely disappeared. Certainly they do not exist to such extent as to constitute them unfair competitive practices.

2. Changes in admission prices are almost entirely seasonal, or the result of unusual conditions in a particular locality. It is natural for a distributor, who has had a long period of experience with a particular exhibitor (whether the owner of a single theatre or a large circuit), whom he has found to be a capable theatre operator, to leave to the

judgment of that exhibitor the question of admission prices. No instance has been shown in this case where any one was harmed by changes in admission prices made by Schine and, in any event, a very mild injunctive provision would be all that is required to eliminate this possibility *in toto*.

3. The Court has included in the Judgment a provision against so-called non-competitive agreements. A number of these agreements were physically introduced in evidence. but no attempt was made to analyze the same, or any of them, nor was any evidence introduced indicating that they had in any way operated to restrain competition. The obvious purpose of these agreements was to protect the good [fol. 5254] will which the Schine Circuit was buying in connection with its purchase of the land and buildings in which a certain motion picture enterprise was being operated. Such an agrement, properly limited as to scope, has always been upheld by the courts as entirely legal and proper. If, in any instance, the defendants have overstepped the bounds, this should be pointed out to them so that in the future the scope of the agreements will be properly limited. We are certain that Court did not intend absolutely to forbid the making of any such agreements at all.

A comparison of the above suggestions with the alleged abuses reference to which appears in the Opinion and the Findings of Fact shows that every alleged abuse complained of can be completely eliminated by the application of the suggested remedies without ordering the sale by Schine of a single theatre.

Thus, in the case of "evils" which are claimed to have resulted from buying power exercised by Schine by combining "towns" in making deals with distributors, the requirement that Schine buy separately for "closed towns" and "open towns" which operated successfully under the 1942 Consent Order will operate with equal success now. It has been pointed out repeatedly not only in this case, but in other litigation, that where a motion picture has been licensed by an exhibitor for a given run, it is necessarily impossible for the distributor to license the same picture for the same run to a different exhibitor. However, the segregation of buying as between "open" and "closed" towns would effectively deprive Schine of any unfair competitive advantage which it might be claimed to have had in the past. The suggestion goes even further and enter-

tains the possibility of separate buying for separate exchange centers.

[fol. 5255] In this connection, the remarks of Assistant Attorney General Robert Sher in connection with the presentation to the Court of the Consent Decree in *U. S.* v. *Paramount, et al.* are pertinent. Mr. Sher said:

> "One of the objectives of the anti-trust law, as I see it, is to bring about competition. Now competition in the motion picture industry, the ideal competitive system, would be to have every picture individually sold to the highest bidder. That would bring about an increase in cost that would probably be prohibitive at this time. We approached that when we got to cutting down the size of the block. We did not quite get there, but we approached it, and it seems to me what most of the objections that have been presented here today involve is the objection to competition, and not an objection to the decree."

With respect to clearance, it appears that numerically more instances of claimed unfair clearance are mentioned in the opinion and findings than any other single alleged abuse. It is submitted that the system of arbitration established under Section VIII of the Paramount Decree furnishes a convenient, expeditious and impartial forum for the correction of any and all abuses in relation to clearance.

The plaintiff may now argue, reversing the position previously taken by it with respect to clearance, as indicated by the quotation from Mr. Hayes at page 117 *supra, that* clearance *per se*, is illegal. In fact, in the course of the argument in *U. S.* v. *Paramount*, et al. before the Three Judge Court, Mr. Wright stated point blank in answer to direct questions asked by Judge Hand, that although at one time he had not thought that there should not be any [fol. 5256] clearance provisions at all by anybody, he now does so think and desires to scrap the Consent Decree completely insofar as it purports to arbitrate the clearance. If the plaintiff should be successful in establishing this proposition, there would be no need to consider clearance remedies at all as far as Schine is concerned, because clearance would not exist.

The subject of franchises might properly be considered a sub-head under buying power, but this is somewhat

academic at this time, as Schine has no franchises and has not had any since 1942, and would be willing not to have any unless the buying practices of the industry in general necessitate buying by means of franchise.

THE PLAINTIFF'S SO-CALLED PLAN SHOULD BE REJECTED IN TOTO.

Respectfully submitted; Edward F. McClennnen, Willard S. McKay, Samuel S. Isseks, Howard M. Antevil, Attorneys for the Defendants severally.

[fol. 5257] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PLAINTIFF'S REPLY TO DEFENDANTS' OBJECTIONS TO PLAN OF REORGANIZATION FILED ON FEBRUARY 25, 1946

While the procedure outlined by the court does not require the filing of any formal reply to defendants' objections to our proposed plan of reorganization, we think it would be helpful to have on file before the argument a full statement of the plaintiff's position. We are, therefore, filing in this form a statement of the reasons which make the defendants' objections untenable.

At the outset it should be noted that the objections filed by the defendants are mainly a reiteration of the argument on the merits already presented to the court by the defendants' main brief, reply brief, and brief in support of their motion to amend the findings and judgment. The defendants' fundamental position with respect to section III of the judgment is that the court may not enforce the judgment of dissolution, realignment, or reorganization that it has already entered. The defendants do not propose another form of reorganization than that suggested by the plaintiff, nor have they suggested any alternative scheme of dissolution or realignment to accomplish the objective stated by the court of restoring and maintaining fair competition between them and others. They simply insist that the court declare the most important section of its judgment a nullity.

In this respect the defendants' position is similar to that adopted by them in their July, 1943, report with respect to the limited divestiture ordered by the consent judgment of May, 1942. The defendants then assumed that they were

free to repudiate all or any part of that order whenever they [fol. 5258] found it expedient to do so. They now apparently regard the lapse of time during which they have illegally enjoyed ownership of those theatres and the substantial profits resulting therefrom as having relieved them from any necessity of disposing of the properties remaining unsold under that order. We do not believe that the lapse of time makes a judgment any less binding, no matter how profitable such lapse may be to the defendants, and we see no reason to take any different view toward the present litigated judgment than we did toward the former consent judgment. In both cases the court is confronted with a defiance of its orders which falls dangerously close to the line dividing argument from contempt.

In our view the court would be fully justified, in the light of the objections filed, in simply entering an order embodying the plan of reorganization proposed by plaintiff without any further hearing. The court is under no obligation to devise a plan of its own. Traditionally, when confronted with situations of this kind in enforcing the Sherman Act, the courts have necessarily placed the burden on the parties of submitting such detailed plans as they believe will accomplish general objectives outlined by these courts. Where prior Sherman Act judgments have ordered dissolution we know of no other instance in which a defendant declined to submit any plan whatsoever when directed to do so by the court. By this course of conduct we submit that the defendants have deprived themselves of standing to object to any plan upon the ground that it will not carry out the objectives stated in the judgment. Since that is actually the only purpose of further hearings, the question as to whether or not the judgment should have been entered having already been disposed of, the April 16 hearing would appear to be superfluous under the present state of the record.

However, if the court chooses to consider the defendants' objections notwithstanding that they are in reality directed to the purposes of the court's judgment rather than the means by which it is to be carried out, we are submitting the following comments regarding the plan for the court's consideration.[1]

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[1] Comments concerning individual situations referred to in the objections have been confined to an appendix attached hereto.

[fol. 5259] I

In Making Effective a Plan of Dissolution, Realignment, or Reorganization for the Purpose of Restoring and Maintaining Competition the Court Must View the Competitive Situation as a Whole and Frame Its Judgment Primarily With Respect to Future Operations

The defendants have apparently suggested that unless a particular property has been expressly found to have been illegally acquired it may not be divested, no matter how flagrant is the monopoly power enjoyed by the defendants through possession of an aggregation of similar properties nor how widespread and repeated their abuses of that monopoly power have been.[2] Underlying the defendants' position is a false assumption that the judgment calls for the restoration of competition between particular theatres whereas it actually requires restoration of competition between the defendants' business, viewed as a whole, and other businesses. The defendants cite no authorities of any description in support of this suggestion and a reference to a few cases in which it has been expressly rejected in dissolving combinations found to have violated the Sherman Act will suffice to show that it is completely erroneous.[3]

> In fashioning the remedy decreed by Section 11 (b) (1) Congress was following a pattern set many years ago by decisions applying the Sherman Antitrust Act, Northern Securities Company v. United States, 193 U. S. 197; Standard Oil Co. v. United States, 221 U. S. 1; Continental Insurance Co. v. United States, 259 U.S.C. 156, and the Commodities Clause of the Hepburn Act, United States v. Lehigh Valley Railroad, 220 U. S. 257; U. S. v. D. L. & W. Railroad, 238 U. S. 516.

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[3] On April 1, 1946, the Supreme Court, in sustaining the constitutionality of the Public Utility Holding Company Act of 1935, as applied to the North American Company by dissolution order unsupported by any finding that it had illegally acquired the properties divested, pointed out that:

[2] We say this is *apparently* suggested by their objections inasmuch as even in the situations where there are findings of specific illegal conduct attending a specific acquisition the defendants still insist that divestiture would be improper.

In *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, there was no express finding by the court that the acquisition of any of the stock interests there ordered divested were in themselves illegal. Each of the corporate defendants there involved was ordered to divest itself of all stock interests held in affiliated corporations, whether defendants or non-defendants, except one which had been dismissed as a defendant at the close of the plaintiff's case. Each individual defendant was compelled to sever all connection with [fol. 5260] all such corporations except one to be chosen by him.

In the *Crescent* case the court specifically found that the acquisition of some of the stock interests ordered divested resulted in an elimination of pre-existing theatre operating competition, as is always the case in using a stock acquisition to purchase a competitor's theatre or an interest in it. However, as to other affiliations, notably Crescent with Rockwood, there was no such finding and the court's conclusion that the defendant corporations should be separated from each other and from their affiliated non-defendant corporations as well, necessarily rested upon the combined use of all of these corporation to secure illegal film licensing advantages over competitors.

If the same standard for dissolution were applied here, each corporate and individual defendant here involved would be left in possession of only a few theatres and the result would be far more drastic than the plan proposed by plaintiff in this case. We have suggested here less rigid standards than the complete separation of the defendant corporations and their affiliates adopted in the *Crescent* case because we believe the flexible standards set up by our plan promise more in the way of effective future competition than application of the *Crescent* formula would yield.

In *Standard Oil Co.* v. *United States*, 221 U. S. 1, the test which has guided dissolution decrees ever since was laid down at page 78 as follows:

> As penalties which are not authorized by law may not be inflicted by judicial authority, it follows that to meet the situation with which we are confronted the application of remedies two-fold in character becomes essential: 1st, To forbid the doing in the future of acts like those which we have found to have been done in the past which would be violative of the statute. 2d,

> The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about.

The decree in that case dismembered the Standard Oil trust by complete divestiture of the subsidiaries of the New Jersey corporation without reference to the manner in which the particular stock interests involved had been acquired. The defendants' brief, filed March 7, 1910, in the Supreme Court, protested in vain that the decree there involved took away from this company "*all supervision over these different refining companies, even over those which they themselves, working jointly, have absolutely created with their* [fol. 5261] *own joint means*, and compels these refineries to stand alone, to be independent, to compete with one another." (pp. 123-124)

A dissolution decrees much broader in scope but somewhat similar in conception to the one involved here was considered in *United States* v. *International Harvester Co.*, 274 U. S. 693 (1927). There a combination in restraint of trade in harvesting machinery, which had been originally formed in 1902 by combining *five* independent manufacturing competitors, was ordered dissolved in 1914 by separating the combination into *three* substantially equal parts. This decree was modified by consent decree in 1918, which provided that International should sell three harvesting machine lines made and sold under the trade names "Osborne," "Milwaukee," and "Champion," respectively, and further provided that the defendant company was prohibited from "having more than one representative or agent in any city or town for the sale of harvesting machines and other agricultural implements."

The decree also provided that if at the end of a specified period of time competitive conditions should not have been restored, the United States might move for further relief designed to accomplish this objective. In 1923 the Government filed a supplemental petition alleging that competitive conditions had not been restored and praying for further dissolution relief. The trial court found against the Government and declined to disturb the 1918 decree.

Upon the Government's appeal it argued that restoring competition meant restoring competition as it had existed in 1902, just before the combination was formed. The court rejected this argument and in affirming the District Court pointed out that substantial competition had arisen since 1918 in the towns where International harvesting machines were sold by virtue of the loss of five thousand dealers under the provision limiting International to one dealer per town. It had formerly marketed its machines under several brand names, each one of which was handled by a different dealer on an exclusive basis.

The Supreme Court pointed out that the 1918 decree had therefore resulted in many of the dealers formerly engaged in marketing International machines being taken over by competitors and that active competition in the sale of harvesting equipment had been thereby restored. There was [fol. 5262] no finding that any of the lost dealers had been unlawfully acquired. In fact, the trial court which originally ordered the dissolution expressly found that the general conduct of International toward its competitors since the formation of the combination in 1902 had been fair. The sole basis for the entry of the dissolution decree was the merging of five competing manufacturing units with a monopolistic intent, but these could obviously never be restored to their 1902 status.

The notion that a judgment of dissolution "to restore competition" must be read as restoring conditions which existed prior to the formation of the illegal combination was thus expressly rejected by the Supreme Court when advanced by the Government. So far as we know, no defendants other than those involved in the instant case have suggested such a proposition to any court. In any event, a careful study of the dissolution decrees which have been litigated discloses none in which any court has ruled that property ordered disposed of to dissipate a monopoly or unlawful restraint of trade must be limited to the property found to have been illegally acquired.

In *United States* v. *American Tobacco Co.*, the original decree entered by the trial court (1 D & J 157) contained no plan of dissolution. On appeal, the Supreme Court held that dissolution was required, 221 U. S. 106. The final decree (1 D & J 165) required the organization of several new corporations and the transfer to such corporations of specific plants and equipment of certain of the defendants

which would make the new corporations effective competitors, without reference to how these assets had been originally acquired.

In *United States* v. *Eastman Kodak Co.*, 226 Fed. 62 (W. D. N. Y. 1915), the Government brought a suit under the Sherman Act against the Kodak Co. of New York, the Kodak Co. of New Jersey, and a number of individuals. The final decree of this court, entered on January 20, 1916, required that the business and assets of the two defendant corporations be divided in such manner and into such number of parts of separate and distinct ownership as might be necessary to establish competitive conditions and bring about a new condition in harmony with law. A plan to effectuate this judgment proposed by the Government came on for hearing and was approved, 230 Fed. 522 (W. D. N. Y., [fol. 5263] 1916). Judge Hazel refused to approve the proposed plan of the defendants because it failed to provide for complete separation of these businesses.

An appeal was taken to the Supreme Court but was dismissed by the defendants and thereafter the parties submitted an agreed plan which became the judgment of the court on February 1, 1921. This plan required the Eastman Kodak Co. of New York to offer for sale certain real and personal property acquired by the defendant from other manufacturers. Each purchaser had to be approved by the Attorney General and had to have the purpose to make and sell the lines of goods represented by the purchase. It was perfectly clear from this provision that the plan was quite properly concerned with the creation of future competition rather than the original mode of acquisition of the property. If there were any disagreements as to price, the matter was to be settled by agreement between the Attorney General and the defendant, or in case of their failure, by the court. If the properties were not sold within two years, then on the request of the Attorney General, they were to be sold at public auction to the highest bidder but not for less than an upset price.

In *United States* v. *E. I. Dupont de Nemours & Co.*, 273 Fed. 869 (D. Del., 1921), the court pointed out that control of the industry in that case (explosives) was not so much numerical as it was territorial. Therefore, in its decree (1 D & J 195) it required the creation of two new corporations and the turning over to such corporations of numerous plants in various parts of the country, in a manner designed

to create competition with the DuPont company in each state where its remaining plants were located. In the instant case, Schine's control is both numerical and territorial and therefore the plan proposed by the Government is designed to diminish both types of control.

In *United States* v. *Hartford Empire*, 323 U. S. 386, the court required the defendants to make available all of their present glass-making machinery patents to all comers upon reasonable royalties, although there was no proof or finding of illegal acquisition as to the great majority of these patents. It also made the same order with respect to future patents which obviously could not have been predicated upon any theory of illegal acquisition.

The court in that case applied the doctrine stated by [fol. 5264] Judge Learned Hand in *United States* v. *Corn Products Refining Co.*, 234 U. S. 964, 1018 (S. D. N. Y., 1916), appeal dismissed, 249 U. S. 621 (1919), as follows:

> In all cases where the history of the combination has been such as this, the Supreme Court has declined to rest upon injunctions alone. The difficulties of proof, the delay, the cumbersome inquiry necessary to ascertain again whether the defendants shall have actually discontinued, all make against such a limitation. It may be safely assumed that evidence such as was by chance available here of the actual purposes of those in charge will never again exist. Without it, perhaps, it is doubtful whether the case could have been proved. Yet it is a reasonable assurance to take that, when an innate proclivity has so abundantly manifested itself over a period of years, it shall be disabled from further opportunity.

The court's judgment, entered November 13, 1916 (1 D & J. 433), in that case required that the factories, business and assets of the Corn Products Refining Co. should be divided in such manner and into such parts of separate and distinct ownership as should be necessary "to restore competitive conditions and bring about a situation in harmony with law." A consent judgment of March 31, 1919 provided for the sale of specified properties and the divestiture of security interests in other properties with a view to future competitive operations. No attempt was made to recreate the precise competition found to have been suppressed.

Any Sherman Act injunction of necessity looks to the future rather than to the past. Putting Schine and its competitors back in the position they respectively occupied before Schine embarked upon a program which resulted in the widespread competitive injuries revealed by the evidence, if it were possible at all, would clearly involve a far more drastic scheme of dissolution than that here proposed. It would also involve an impossible estimate of the profits illegally derived by Schine from these activities and an impossible distribution of such profits among the injured competitors and members of the public who have been paying tribute to Schine in the form of monopoly admission prices in the majority of its towns for many years. The suggestion that the existence or non-existence of particular competition in the past should be the test as to whether an opportunity to compete in the future should now be created and maintained is unsupported by precedent and wholly impractical as well.

[fol. 5265] The Plan Contemplates No Destruction or Confiscation of Property Values

The defendants' suggestion that the properties ordered divested would be sold at prices unfair to them simply assumes that the court would not administer the plan fairly, since the plan expressly provides for court approval of all sale prices. In providing the defendants with a reasonable opportunity to file objections the plan does not limit the scope or character of their objections and they may clearly object to such prices or any other terms as they choose. The action of this court in permitting the defendants to offer the properties ordered sold under the 1942 judgment at prices which were substantially greater than the maximum they had agreed to when the order was entered clearly demonstrates a willingness to protect the defendants' sale prices. The suggestion that the court will not adequately protect the defendants' rights in this respect in the future is thus wholly unwarranted.

If there is to be any criticism of the plan with reference to alleged confiscatory effects, it must be directed to the plan's failure to disturb the defendants' existing capitalization of property confiscated from competitors and the public in the past by the illegal practices described in the court's opinion. It is, of course, impossible to estimate the

precise amount of money extracted from the public in the Schine towns in the form of excessive admission prices directly attributable to the defendants' suppression of competition in those situations, but it is clear enough by this time that it amounts to many thousands of dollars. Similarly, their record shows a systematic destruction of competitors' profits by illegal means in amounts impossible to compute.

The net result of these violations, insofar as they are effected by this plan, is simply that Schine is now compelled to convert the capitalized value of this past confiscation of other people's property into cash when the market is more favorable to Schine than at any time since the violations occurred. The defendants' claim of confiscation in this case is reminiscent of the defendants' argument in the *Crescent* case before the Supreme Court that the taxes payable upon the large profits to be realized in disposing of [fol. 5266] the stock interests ordered divested by the District Court would amount to confiscation. The Chief Justice commented that that was the kind of confiscation to which most of us would like to be subjected and his remark is equally applicable here.

The suggestion also appears in the defendants' objections that execution of the plan would so injure the rights of absent parties that it could not be made effective in any event. Among these absent parties are said to be the numerous subsidiary corporations wholly owned and controlled by the defendants, through which their various theatre operations are carried on. The suggestion that the court may not, through the defendants, exercise the same control over these corporations that the defendants themselves do, simply because its opinion recognized them as the separate legal entities which they undoubtedly are, needs no comment. The claim that divestiture could not be ordered in the absence of other stockholders and corporations which the defendants do not control was expressly rejected in the *Crescent* case. In any event, such objections as such stockholders might have to any particular sale must be made by them rather than by the defendants, who have standing in this suit to represent themselves and their controlled subsidiaries only.

III

The Powers Granted To The Trustee Are Clearly Proper And Necessary To Effectuate The Plan

From the defendants' objections one would suppose that the appointment of a trustee to sell property was a novel proceeding in a Sherman Act case. The Court, of course, knows that this is a well-established practice, but it may wish to refer to the following cases as instances in which other federal courts have explicitly recognized or used the power to appoint receivers or trustees to carry out a program of divestiture under the antitrust laws: *United States* v. *American Tobacco Co.*, 221 U. S. 106, 188; *United States* v. *Great Lakes Towing Co.*, 217 Fed. 656, 661 (N. D. Ohio), appeal dismissed, 245 U. S. 675; *United States* v. *International Harvester Co.*, 214 Fed. 987, 1001 (D. Minn.); *United States* v. *Lake Shore Ry.*, 203 Fed. 295, 281 Fed. 1007, 1013 (S. D. Ohio), appeal dismissed, 248 U. S. 587; *United States* v. *New York, New Haven & Hartford R. R. Co.*, S. D. N. Y., April 15, 1916, 1 D & J 529. Unreported decrees [fol. 5267] in railroad cases have also included the appointment of trustees to hold, vote and dispose of shares of which defendants were to be divested. *United States* v. *Lehigh Valley R. R.* (S. D. N. Y., Eq. No. 11-129, November 7, 1923); *United States* v. *Reading Co.* (E. D. Pa., No. 1095, June 6, 1921).

The much litigated *Swift* case, 276 U. S. 311, 279 U. S. 553, 286 U. S. 106, concluded with the appointment of a trustee to take possession and dispose of Swift's holdings in Libby, McNeill & Libby. Order Appointing Trustee, *United States* v. *Swift & Co.*, Supreme Court of D. C., Eq. No. 37623, July 8, 1933.

So settled is the power that the appointment of a trustee is a frequent feature of consent decrees, many of which are unreported. *United States* v. *Columbia Gas & Electric Corp.* (D. Del., Eq. No. 1099, January 29, 1936); *United States* v. *Fox Theatre Corp.* (S. D. N. Y., Eq. No. 51122, April 15, 1931 and July 10, 1931); *United States* v. *Rand Kardex Bureau* (S. D. N. Y., Eq. No. 39-14, December 9, 1926); *United States* v. *Joseph Leibner* (S. D. N. Y., Eq. No. 37-319, July 2, 1926); *United States* v. *Borax Consolidated* (N. D. Cal., Civil No. 23690-G, August 16, 1945).

Defendants' animadversions upon the powers of the trustee proposed in plaintiff's plan are astonishing, in view

of the fact that all sales are subject to approval of the court, that the trustee may not pay out one cent except on order of the court, and that he is expressly excluded from participation in the management or operation of defendants' theatres pending sale. The only novel feature of this arrangement is that, unlike the numerous decrees cited above, our proposal withholds from the trustee complete possession and jurisdiction over the extensive holdings of the guilty defendants. The *Borax* decree, for example turned over to the receiver possession of the mining property involved to be administered and maintained pending sale pursuant to court order; and the defendants were enjoined to "cooperate fully with the receiver in effectuating the transfer."

In the *Swift* case the trustee was directed to sell the Libby stock "as quickly as may be at a reasonable price; the defendant to furnish all necessary assistance in locating prospective purchasers." The trustee was given the "right and it shall be his duty to examine into and give constant attention to the relations and transactions between defendant Swift & Company and Libby, McNeill & [fol. 5268] Libby and to the manner of the exercise by the defendant Swift & Company of its rights derived from the ownership of the said shares." The trustee was to vote the shares but not "so as to interfere with the management and conduct of Libby" unless the trustee thought Swift was using its ownership interest in a manner inconsistent with the decree. Compensation was ordered in such amount as the court "may consider fair and just at the conclusion of his services," and this was subsequently amended to fix $10,000 as the annual salary. In the *Fox* decree the trustee was allowed "reasonable compensation, the amount thereof to be approved by the court." The *Rand Kardex* decree ordered the trustee to sell "at public or private sale and on terms fixed by him," defendant to pay expenses and "reasonable compensation" of the trustee. The Special Master appointed under the *Leibner* decree was ordered to sell the property at auction, subject to a stated upset price. Sale at a "reasonable price" or at auction was expressly provided for in *United States* v. *International Harvester Co.*, 274 U. S. 693; *United States* v. *Eastmen Kodak Co.*, 226 Fed. 62 (W. D. N. Y., 1915); *United States* v. *Cement Securities Co.* (D. Colo., Eq. No. 7295), and there is nothing inconsistent with such sales in the plaintiff's proposal.

It goes without saying that no trustee may perform the function of selling property without the means of determining all of the facts concerning what he is selling. That is obviously all that the limited visitorial powers provided for in the plan give him. The *Bausch & Lomb* case, 321 U. S. 707, previously submitted, discusses at length the extent to which the Justice Department may be granted such powers. Clearly, powers given by the courts to an agent to carry out its judgment should be no less extensive.

Conclusion

The defendants assume that they have been discharged by lapse of time from their obligation to dispose of the theatres remaining unsold under the order of May, 1942. The court will recall that jurisdiction to appoint a trustee to effectuate these sales was expressly reserved at the hearing in May, 1944, pending the outcome of further efforts by defendants themselves to dispose of these the[illegible]s. Although at that time they sought and obtained a modification of the order permitting them to sell at prices in excess of those specified by the order, to wit, the amount [fol. 5269] of their investment, due to an asserted increase in the market value of the theatres, we are now told that they have not been sold because no one would pay what Schine had invested in them. These contradictory assertions simply give further proof of the essential unreliability of the defendants themselves to carry out any commitment involving the sale of property.

We submit that regardless of the form taken by the plan put into effect to carry out the court's judgment of October 31, 1945, as amended by the final judgment filed on April 1, 1946, and regardless of whether or not an appeal is perfected by the defendants from that judgment, a trustee should be appointed at this time to sell the theatres still unsold under the 1942 judgment, even though sales may be stayed as to other theatres pending the outcome of whatever appeal may be filed from the 1946 judgment. If the defendants are permitted to continue their successful defiance of the prior judgment, they will certainly be encouraged to use the same tactics to frustrate enforcement of the later judgment, with the result that the entire suit will become a nullity.

The defendants obviously do not regard the injunctive

provisions of the existing judgment as any bar to continuing domination of the motion picture business in the areas where they operate. The only threat to that position is that posed by actual competitive theatre operation in those areas. That the nature of the competition which plaintiff's plan would make possible is extremely mild apparently has no effect on the defendants' determination to prevent any competition whatsoever. Actually, the right to retain a theatre of their choice in the towns where they own two or three theatres means that the defendants may retain a dominant position in most of those situations. There are wide differences in seating capacity which permit them to retain a far larger theatre than any sold in most cases. Also, one theatre may have been closed for years and another operated part-time or as a second run house. Thus, the divestiture proposed is even less drastic in terms of control of volume of business than it is in terms of number and character of units to be disposed of.

We respectfully suggest that if any other plan could be devised which would establish substantial theatre operating competition in the territory now dominated by the defend- [fol. 5270] ants with any less extensive transfers of theatre ownership than those proposed by plaintiff, we should welcome such a plan The burden imposed on the Justice Department by any plan of dissolution is one which it undertakes only with the greatest reluctance at any time, yet that burden must be assumed here in order to discharge its obligations under the law. We submit that the defendants' failure to offer any alternative proposal is in itself the clearest recognition that the plan proposed by the Government is the minimum which may be accepted by the court, if substantial meaning is to be given to section III of its judgment.

Respectfully submitted, Robert L. Wright, Philip Marcus, Louis B. Schwartz, Special Assistants to the Attorney General.

Wendell Berge, Assistant Attorney General.
George L. Grobe, United States Attorney.

We are indebted to the defendants for calling our attention to two inadvertent errors in the plan. Dolgeville and Newark, New York, should be omitted from Section I A and Newark should be included in Section I B. Van Wert, Ohio, was also inadvertently omitted from Section I B.

The plaintiff's proof in this, as in any antitrust case, was confined to that thought sufficient to establish the violations charged and point the way to the remedy required to terminate them. Likewise, the Court's opinion and findings were even more selective in embracing only what was necessary to support the judgment. Thus, the defendants' general assumption that any facts not explored by the proof or the Court's opinion were favorable to them is untenable on its face. Their further effort to supply facts which they regard as favorable to them in situations where the record is silent, by mere assertion of counsel, also requires no reply.

We have, however, set out the following comments on towns referred to in the objections which point up the inadequacy of the defendants' record references in these individual situations, even if an elaboration of their history were thought to be relevant to the problem now before the Court.

1. Ashland, Ohio.

According to the defendants' recital, on page 36 of its objections, Schine acquired the best theatre, the Palace, in 1935; it acquired the Opera House, an old theatre, in 1936; and it acquired the use of a small converted store show in 1938. Because of Schine's buying power, it has been able to obtain a clearance of 90 days over 2nd run for a first run in the "old Opera House" as well as in the "best theatre" from Paramount, Columbia, and United Artists (Exhibits P. 224, C. 181 (35), 903). Loew for the 1940-41 season was giving both theatres a 60 day clearance in the town (Exhibit 981 (47)). Paramount, Columbia, United Artists, and Warner gave clearance over various towns to both theatres (Exhibits P. 224, C. 181 (35), 903, W. 3).

2. Athens, Ohio.

Defendants on Page 37 of their objections state that Schine bought the Athens Theatre in 1935 and in 1936

acquired the Court and the Ohio which the defendants used as "converted store shows." These "converted store [fol. 5272] shows" as well as the Athens were given clearance over all theatres in Athens County by Columbia, Fox, and United Artists (Exhibits C. 181 (46), F. 184, 958).

3. Bath, N. Y.

In their "detailed historical analysis" of this town on Page 17 of their objections, the defendants fail to mention that this one-theatre town has obtained a 30 day clearance over 1 to 5 other towns (Exs. R. 4, F. 139, W. 3, Sched. E., 981 (4), 959, C. 181 (1), P. 174).

4. Cambridge, Maryland.

Although the recital in defendants' objection on Page 44 would indicate that all 3 theatres have been operated, Schine's answers to interrogatories reveal that one of these theatres has been kept closed and has been only occasionally opened and the contracts in evidence in respect to this situation cover only the Arcade and State Theatres.

5. Carthage, N. Y.

In its recital on Page 18 of defendants' objections, the inference is given that Schine never had competition in this town and a 90 day clearance given by United Artists and 120 day clearance given by RKO is said to be meaningless. The discrimination practiced by the distributors in favor of Schine with respect to Schine's *opposition* in Carthage in 1934 is spelled out in Exs. 176, 178, and 179. It is noteworthy that at the time of the trial Schine no longer had any competition in Carthage.

6. Cortland, N. Y.

Groton and Marathon are respectively about 12 and 14 miles from Cortland. In 1933-34 Schine's United Artists contracts did not provide for clearance over Groton (Ex. 280). Subsequently they did (Exs. 958, 959). In May of 1939, Metro's local branch manager recommended that Schine's 30 day clearance over Groton and Marathon be reduced to 14 days (Ex. 488). But Metro, Fox, Warner, Paramount, United Artists, and Columbia continued to give both the State and Temple Theatres a 30 day clearance

over these towns as well as over several other towns (Exs. 618, 981 (9), F. 143, W. 3, W. 34 (1), P. 202, 959, C. 181 (61)). This is one of the towns in which Schine's theatres have been given a clearance over towns in which there was no theatre (Tully-Exs. 226-229).

[fol. 5273] 7. Gloversville, N. Y.

Since the defendants in their recital of objections on Pages 52 and 53 have seen fit to refer to an arbitration proceeding, we may call the Court's attention to the fact that in that arbitration decision (Appeal Board Decision No. 67), a copy of which plaintiff has furnished to the Court, it was found that the distributors had unreasonably given Schine's two theatres, widely varying in revenue possibilities, the same clearance over the Johnstown Theatre.

8. Hamilton, N. Y.

The defendants on Page 22 of their objections state that this town is not mentioned in the Court's findings of fact. This is true only because of what appears to have been a typographical error in the Court's opinion where it refers to Hornell taking a clearance over Earlville, as to which there had been no previous clearance. Schine does not operate theatres in Hornell but does in Hamilton and it is in respect to Hamilton that such clearance was taken. See Exs. F. 101 (12), F. 16, and F. 152.

9. Kent, Ohio.

Defendants' objections refer to two theatres, one of which Schine closed in September, 1937. Not mentioned is the fact that the lease of this closed theatre was kept renewed at a commitment of $18,000 (Ex. 947).

10. Little Falls, N. Y.

As to Little Falls, the recital of defendants' objections, on Page 59, refers to certain clearances and states that there is no evidence that the alleged clearance was over operative. It might be observed that the absence of competition to Schine in Little Falls would indicate that the clearance was quite operative. Moreover, this recital tends to give the impression that Schine had no opposition during the period in which such clearances were in operation. The

record shows, however, that in 1931 and 1932 the Hippodrome Theatre was operated by an independent exhibitor by the name of Wood, see Exs. 635 D and 672 A. Since Schine did not acquire this theatre until 1936, it is fair to assume that during the interim Schine had opposition from this theatre.

During the Fox operation, the maximum clearance taken [fol. 5274] by theatres in Little Falls over Dolgeville appears to have been 15 days (Exs. 635 G, 635 R, 672 B). During the NRA days the Code Authority decided the clearance of 30 days Schine had over Dolgeville be reduced to 14 days. But in a letter dated August 31, 1934, R. S. Smith, Warner's local branch manager, wrote to his home office superior, R. Mochrie: "Lynch insisted that we go along on a 30 day basis even though the Board approved the 14 day arrangement." (Ex. 549.) Schine got the 30 day clearance (Exs. 672 E, 958, 618, C. 181 (70), 1009, 324 C, 635 I, P. 210). It was during Schine's operation that clearance was given over Ft. Plain over which clearance had not previously been given (Exs. 635 H, 635 I, 672 C, 672 D, 339 H, P. 210, 604 D, 604 E).

11. Milford, Delaware.

It is significant to note that although Schine had no opposition in this one theatre town, it was obtaining from Warner for the 1939-40 and 1940-41 season a clearance of 90 days in Milford and from Fox for the 1939-40, 1940-41 seasons a clearance of 30 days (Exs. W.4 (98), F.127).

12. Newark, N. Y.

The defendants on Page 27 of their objections say that this town is not mentioned in the opinion or findings of fact. The Court in its opinion refers to letters between Schine and United Artists with respect to this situation although the opinion does not refer to the situation by name. In this town Schine has kept the Crescent, a closed theatre, on renewal leases, at a commitment of $35,200 (Exs. 921, 922, 83).

13. Oneonta, N. Y.

According to the defendants' recitals on Page 66 of their objections, Schine acquired the best theatre in this town and

also a "smaller, poorly constructed" theatre. The record shows that both the good theatre and the "smaller, poorly constructed" theatre were given clearances by the distributors over 5 to 6 towns, a number of which were a considerable distance from Oneonta, and this despite the fact that a difference in the rental possibilities of the two theatres was recognized by certain of the distributors in different film rentals for the two theatres, see Exs. W. 34 (20), U. 207 (19). For many years Schine took a clearance of 30 days over these various towns, getting 40 days from United Artists in 1933-34, as to 4 towns, see Ex. 281.

[fols. 5275-5276] 14. Oswego, N. Y.

In defendants' objections, on Page 67, they do not refer to the fact that Schine has kept the Richardson, a closed theatre, renewed at a commitment of $58,500 (Exs. 982, 983, 984, 985).

15. Piqua, Ohio.

The defendants' objections do not refer to Schine's renewals of a lease on the Bijou, a closed theatre, at a commitment of $13,220 (Exs. I. A. 17 (a), 18, 23 P. 14, Exs. 911, 912, 913, 914).

16. Wooster, Ohio.

Defendants in their objections do not refer to the fact that Schine has kept renewed a lease on the closed theatre, the Opera House, at a commitment of $16,000 (Exs. 962, R. 3851).

[fol. 5277] IN UNITED STATES DISTRICT COURT

[Title omitted]

TRANSCRIPT OF HEARING

Proceedings before the Honorable John Knight, United States District Judge for the Western District of New York, Justice presiding, at the U. S. Court House, Buffalo, New York, Tuesday, April 16, 1946, at 10 o'clock a. m.

APPEARANCES:

Robert L. Wright Esq., Special Assistant to the Attorney General, appearing in behalf of the United States.

Willard S. McKay, Esq., appearing in behalf of the Defendants.

[fol. 5278] PROCEEDINGS

The Court: You were just speaking to me about this motion and the question of some postponement of it.

Mr. McKay: Yes, your Honor, I received on Friday what is called a plaintiff's reply to the objections filed by the defendants to the plan originally submitted by the plaintiff. As I say I got it Friday. It consisted of 25 pages. It raises points that seem to be new to me. I was obliged to send it immediately to the mimeographer first, because I had to have copies for Mr. Antevil and Mr. Schine and other people who had not been furnished it, so that I did not even have the benefit of Friday to look at it. I did write to your Honor on Friday, with a copy to Mr. Wright. I don't know when he got the letter, but I especially came in to New York to dictate it on Friday.

The Court: Why did you not call him by phone?

Mr. McKay: Well, I unfortunately did not hear from Mr. Penney after I talked to him the first time until last night I saw him when I came in here.

This new paper raises, as I say, a lot of new matter which requires study before the argument. I think they take a new theory on some of their points. They say that [fol. 5279] we have not submitted a plan. Well, we have not submitted a formal plan, but we did submit in our objections certain suggestions which were drawn from the consent order of 1942, which probably could be implemented into a formal plan if any indications were given that such a solution would be desirable.

There are 16, I believe, towns mentioned in this paper where they are citing some exhibits that are not referred to either in the opinion or the findings. I have not copies of the exhibits in the case. That does not mean that the defendants have not got them, but I haven't them. I depend on Mr. Antevil for that work. He had not received the copy I sent him as late as Saturday noon. I know he has it now, but he got it after noon on Saturday, and I think it would be profitable from every standpoint if we were allowed the same amount of time which the government had after the receipt of our objections to prepare an answer to this new paper, for which there is no justification, your Honor, even under the old judgment.

In the new judgment the provision about submission of a plan and submission of objections is stricken, and I have [fol. 5280] a motion—the filing of the motion I concede was not timely. I had about decided not to make the motion when I received this new paper, and if I am able to get the adjournment I will withdraw the motion. I simply want to protect my right to make a study of these new contentions of the plaintiff before arguing this very important matter. I consider this matter of the utmost importance to the defendants and they should not be forced on to argue today after receiving this very voluminous document. I do not want to talk about a lot of ancient history, but I want to remind your Honor that our motion for an amendment of the findings was made on November 10th, and it was submitted for argument on December 7th. I could have argued that motion on the 7th of December, but at Mr. Wright's request I consented to a two-months' adjournment. If it had not been for that adjournment, that motion would have been disposed of in December before the time within which the plan was to be submitted ran out. I gave Mr. Wright that two-months' adjournment, and unfortunately right after New Year's I was taken ill. I do not believe I have been out of the house on more than five occasions [fol. 5281] since that time. I am still under the constant care of a physician. It was with extreme difficulty that I persuaded him to let me come up here today, and I do not see how an adjournment of two weeks to give me time to study the plan and to consult with Mr. Schine about the possibility of implementing the suggestions contained in our objections can be objected to, where I say that the objectives sought by the Court can be obtained without

divestiture, which I take it to be your Honor's desire if such a result can be reached, and when those objections are drawn directly from and go beyond the consent order which was satisfactory to the Government in 1942, and which apparently worked from 1942 to 1944. I frankly do not see who is going to be hurt by a two-weeks' adjournment of this hearing.

Mr. Wright: If the Court please, our plan, as your Honor may recall, was filed last February with a supporting memorandum. They were supposed to file under the plan set forth in the order objections within 30 days. Then they were given an extension until April 1 to file their objections by a stipulation which expressly provided that the extension to April 1st was made with the assurance that the [fol. 5282] hearing on the plan would still occur on April 16th, as previously set by your Honor. That was stated in that stipulation. This paper that Mr. McKay is now seeking to use as a basis for further delay is simply a statement of what we proposed to say to your Honor here at the hearing on the plan and objections. In other words, we were good enough to serve him in advance of the argument with a full statement of what our position would be here at the argument. Now, far from being an excuse for any delay the receipt of that paper by him simply put him in a more advantageous position than he would ordinarily have been had we not undertaken to advise him at all prior to today of the points and authorities on which we would rely in the course of this argument. So that there is no basis whatsoever for any continuance of this hearing because we had given him the benefit of a statement of our position prior to the hearing.

Now, in so far as he wants to reply further to anything that is in our reply, I suppose your Honor would entertain whatever memoranda or collection of authorities he might wish to submit in that connection, although it is rather late date for him to do that. They filed their objections and [fol. 5283] the appropriate time to file whatever material they had to support their objections I should have thought was on April 1st, when they filed the objections. This whole proceeding has reached the point where I think it is perfectly clear from Mr. McKay's speech today and his entire conduct that what the defendants are interested in here is delay as such regardless of the merits of the particular procedural device that they use to get it. There certainly

is no merit in any of the reasons he has suggested here today for further postponement and consideration of this plan and how your Honor's final judgment shall be implemented.

The Court: This paper was only served on Friday. I have gone through it. It relates solely to what you would say on the argument. You served the notice of appeal yesterday?

Mr. McKay: Yes.

Mr. Wright: I might say in connection with the notice of appeal, your Honor, that I do not believe yet there is any appealable order entered in so far as Section 3 of the judgment is concerned. I do not think you get a final order until there is an actual approval of a plan of dissolution and [fol. 5284] re-organization or realignment. Any appeal is clearly premature as to that portion of the judgment.

The Court: What do you say to that, Mr. McKay?

Mr. McKay: The judgment as entered now does not say anything about a plan. It does not indicate the submission of a plan. All references to a plan are cut out from the judgment. All it says is that we shall be dissolved, re-organized and re-aligned so as to restore competition.

Mr. Wright: Obviously the only reason that the judgment as entered in March does not refer to a procedure for hearings on the plan is that that procedure had already been carefully outlined by a series of orders in the court. The effect of those orders is exactly the same.

The Court: You mean the proceedings with reference to the trusteeship and the possession of the property is not concerned in this appeal?

Mr. Wright: I say it is concerned. Mr. McKay's point is this, if I understand it—and if it is a point. You will recall the original judgment entered in October in accordance with your opinion provided certain periods within which both sides were to submit plans, and then periods for [fol. 5285] objections. Then he says now because of the amended judgment entered in March after your Honor had entered other orders relating to the plan when the plan was to be filed, because that does not contain the old time limitations in it, then he says there is no basis for a further plan. That is ridiculous on its face.

The Court: Not considering it from that standpoint, but considering it from the standpoint of the appeal, that is all.

Mr. Wright: I say from the standpoint of an appeal there

is no appealable order as to Section 3 until there is an actual plan approved by the Court.

The Court: That may be so, but the appeal itself will bring up the question of the validity of the findings and the violation, will it not?

Mr. Wright: Yes, sir. It is purely a matter of time in the appeal line.

The Court: As rapidly as possible the matter ought to be disposed of, but assuming that the defendants were successful on appeal that would vitiate everything that is done under the plan, of course.

Mr. Wright: Yes.

The Court: Then the inquiry would be if we should not wait for the determination of that appeal pending any [fol. 5286] further motion.

Mr. Wright: My point is, your Honor, that you do not have an appealable order. You cannot constitute an appeal until there is actually a final judgment, and you do not have final judgment as far as Section 3, which provides for dissolution of the circuit, until there is an approved plan of dissolution.

The Court: That does not answer my question. I say, waiving that question for the present, they do have a right to appeal, an appealable order, on the judgment itself except as to Section 3 of the appeal.

Mr. Wright: I think that is quite possible.

The Court: An appeal and a reversal would obviate the necessity of any appeal from the plan.

Mr. Wright: If the Court please, I think in the interest of over all expedition of the matter that the case should be divided up for the purpose of disposition in the Supreme Court on a series of successive appeals. In any event, no appeal could be heard prior to the next term. I assume that your Honor will have taken final action on the plan within the next few weeks or at least in time so that their appeal from the entire judgment or such appeal as they wish to prosecute may be consolidated and heard together. [fol. 5287] Such appeal as we might want to take in connection with the plan could also be taken and the entire matter could be disposed of next Fall.

Mr. McKay: We have just been charged by Mr. Wright with seeking delay. We filed this appeal 16 days after the entry of the amended judgment. We could have waited 60 days. So that by filing this appeal at this time we have ex-

pedited the possibility of a hearing before the Supreme Court.

The Court: How will your appeal as now taken affect the matter in so far as the laying down of any plan by and by? There will be another appeal, will there not?

Mr. McKay: Yes, but that might not be for some time.

The Court: Supposing you were to make a plan or adopt a plan within three or four weeks, or something like that, then you would still have a right to appeal from that?

Mr. McKay: I think we would. But I think your Honor will agree that that judgment which your Honor signed on the 29th of March is a complete final judgment as it stands and does not require any explanation or elucidation.

The Court: Then you think on the appeal the Supreme Court would not have before it the plan at all?

[fol. 5288] Mr. McKay: They would not know what steps were going to be taken to dissolve or reorganize or re-align the circuit. But I wish to point this out to your Honor, that in either in the judgment or the conclusions—I think it was in the conclusions your Honor stated that whatever method of dissolution or re-alignment or re-organization was to be followed would be determined after discussion by such discussion as the Court might desire with counsel. Right up to now we have not had any such discussion. And I also point this out to your Honor: We had this motion pending for amendment of our findings of fact. The motion was made in good faith and it covered substantial points. We had the right to hope at least and maybe expect that it would be granted, that a substantial part of it would be granted. If it had been granted substantially, it would not materially change whatever plan might have been submitted, and I submit that the submission of any plan prior to your Honor's decision on our motion would have been premature, and your Honor decided the motion on the 11th of March, and the reason it was not decided until the 11th of March was because the plaintiff, not the defendants, asked for two months' adjournment. We would have argued [fol. 5289] that motion in December, and the only reason we had to ask for an adjournment after February 4th was that I was sick, and then after I had given them two months voluntarily he restricted me to 21 days.

Mr. Wright: If the Court please, I call your attention to the fact that Mr. McClennen announced in open court six weeks ago that the defendants proposed to file no plan what-

soever. Mr. McKay's statements today are completely irresponsible. He is now saying that they do want to file a plan. At some point there has to be some counsel that can speak with sufficient authority for the Court to rely on it. You have had completely contradictory statements from both of them.

Mr. McKay: Mr. Wright has got onto another siege of making charges against counsel. Last time he charged Mr. McClennen with making a gross misstatement of fact, which was proven to be completely incorrect. Now he says I am irresponsible. I am the attorney of record in this case and I am responsible. What I have said about a plan is that I have submitted suggestions in line with the consent order that was entered in May, 1942, which was satisfactory to the Government at that time, which the Government ad- [fol. 5290] mitted in 1944 had not been violated. We have gone further than that, beause we have agreed to adhere to the clearance system. We have not changed our position at any time through the case, and Mr. Wright changes his every time he turns around. We do not know where we stand with him from one day to the next, and I have said that if I had had any indication that such suggestions that I had made would be satisfactory as a solution of this problem, we would endeavor to implement them. I have said so not only here, but in the brief which is signed by Mr. McClennen. We went down, your Honor, within the week after this judgment was signed, the original judgment in November, we went down, Mr. Isseks and I went down to Washington and we talked to Mr. Ernest Myers, who is an assistant attorney general, as I understand it, in the Decree Department. The purpose of our discussion with him was to see whether a plan could be arrived at. Mr. Myers called a man by the name of Meyer in, and the two of them told us point blank that if we had any idea of presenting to this Court any kind of a plan that was like the Crescent decree we might as well stop wasting our time. So that what kind of encouragement was that to work with the Government in agreement on a [fol. 5291] plan. Then we concentrated on our motion. The motion was not decided until the 11th of March, because the plaintiff got an adjournment of two weeks. Now we come along and ask for two weeks to present this case fully to the Court and we meet with an objection by the plaintiff.

The Court: In the Crescent case, what course did that take?

Mr. Wright: The present status of that is that the defendant——

The Court: I mean on the appeal in the Supreme Court.

Mr. Wright: The decree there was self-executing. The decree itself provided that the defendants should sell all their stock interest in the affiliated corporations.

The Court: How about these other cases where you have a comparable situation here as to a plan?

Mr. Wright: The traditional method has been that both sides have been invited to submit plans, and in every case both sides have submitted plans, and then the Court has made a choice between them, or modified one or the other, and then entered final judgment embodying that plan.

The Court: Is there any case where the appeal had been prosecuted prior to the adoption of the plan?

Mr. Wright: I know of no case where there has been an [fol. 5292] appeal prosecuted prior to the adoption of a plan. In almost every case the hearings on the plan occur, and then a final judgment is entered embodying the final plan approved by the Court, and an appeal taken from the judgment as finally written with the plan set forth.

The Court: I would like to have what the defendants may call their ultimate proposal, the plan of re-alignment or re-organization.

Mr. Wright: I assumed that you had it in the form of those objections, and you certainly had Mr. McClennen's statement before that they were not going to propose a plan.

The Court: I am speaking of the present.

Mr. Wright: I suppose as far as they are concerned if they can keep your Honor from entering any kind of a final plan in this case that is their desire.

The Court: The Court will have to take care of the question of delay.

Mr. Wright: I mean that it seems to me that the past history of the thing indicates that this is a pure delay device.

The Court: As counsel has pointed out, I think that is true that you asked for an adjournment of a couple of months while you were on a case in New York City. We cannot [fol. 5293] charge that against him.

Mr. Wright: If there was a good faith intention upon the part of these defendants to submit any kind of a plan which would accomplish any of the objectives that your Honor outlined in Section 3, they certainly have had ample opportunity to make that intention known to the Court or the

Department in some tangible form before this, and they have submitted nothing, either to your Honor or to us, at any time.

The Court: That is very true. I am speaking as of the present. What have you got in mind, Mr. McKay, as far as this memorandum submitted by the plaintiff is concerned? I think you should be given time to answer that. Can't we proceed somewhat today with the matter before us?

Mr. McKay: Your Honor, I would like to present our case completely at one time. I note that while the memorandum consists of 25 pages and is supposed to be a reply to our paper, it does not say what is wrong with the suggestions we have made. Now I am asking for two weeks in which to study the memorandum and find out what portions of it require attention. I undertake in that two weeks to see what can be done about implementing our suggestions, so [fol. 5294] as to possibly formalize them. I cannot make any guarantee as to how far that will go, but I will say this: That if at the end of two weeks I am able to present the Court with some kind of a definite prospect of submitting a plan, I will not ask any further time.

I want to say this also to your Honor: There was a time, I will concede, early in the course of this case when occasionally we asked for time, but since this case was tried, in the proceedings since the close of the actual trial, the only delay that we have been responsible for is the 21 days that I asked for because I was sick. We filed our briefs ahead of time. Mr. Wright filed his behind time. He has been the man who has been delaying this case ever since the close of the trial, and he does not have any standing to come here and say that we are trying only to delay. The mere fact that we filed this appeal 45 days ahead of time shows whether we are trying to delay it or not, and my request for a two weeks' adjournment I submit is a very modest one.

The Court: Why can you not answer this in writing as well as to come here again?

Mr. McKay: I think, your Honor, that the presentation of it orally might be more effective. Sometimes discussion [fol. 5295] opens up avenues that you do not see in your formal exchange of briefs, and if I were asking for any substantial length of time I would feel possibly that——

The Court: Would your reply be limited to answering, or do you propose to submit any plan?

Mr. McKay: What I would undertake to try to do would be to show your Honor how these suggestions that I have made in the objections could work. Your Honor, in your opinion, pointed out that apparently the principal evil was that we had buying power which resulted from the combined buying of open and closed towns. When your Honor started to discuss things that were wrong with the circuit that was your opening gun, and I propose to show your Honor that that can be eliminated by substantially the methods that were used in 1942. The way the thing stands now I will try to show you the machinery that would be used to put that sort of thing into effect. The 1942 consent order did not try to do anything about clearance, but we have proposed that we would come in and agree that any clearance complaints against us we would consent to arbitration, just the same as is done under the decree in the [fol. 5296] Southern District. I handed your Honor with my memorandum a synopsis showing the way that clearance system has worked and showing that any exhibitor who felt aggrieved could get quick and expeditious relief. We have said in those objections that we were not making any more franchises. We cut out the franchises in 1942. We will agree that we will not make any more, with the proviso that if buying by franchise becomes the general method of buying in the industry, then we can go back to it. I do not think anybody could object to that saving clause, and I feel that with the addition of a certain amount of machinery to those suggestions we can show your Honor that everything that your Honor wanted to accomplish in this action can be accomplished along those lines.

It is a strange thing, but in the four cases affecting this industry, by that I mean the case in the Southern District and the Crescent and the Griffith cases and this case, this case is the only case where the plaintiff is really pressing to have the defendants get rid of some theatres.

The Crescent case was decided by the Supreme Court about a year ago, I think, finally, before your Honor's decision was handed down anyway, and as Mr. Wright says, [fol. 5297] the plan in that case was so simple that it could be written right into the judgment. Nevertheless, simple as that plan is, the Government consented that no action need be taken on it until next July, and that consent was signed by Wendell Berge, Mr. Wright's superior.

The Court: No action was taken on it?

Mr. McKay: No, the Crescent people did not have to put that dissolution or divestiture into effect until July 8th, I think.

The Court: There may have been certain reasons for that.

Mr. Wright: The reasons are recited in the stipulation. There were some people who were to buy these interests who were having difficulty in raising capital to buy them. We gave them additional time on that basis. Their position is wholly different from that of these defendants.

Mr. McKay: In this case, when it was started, Mr. Thurman Arnold came out in a public statement and said that it was supplementary to the Paramount case in the Southern District. He said that the main case was the Southern District case, and that this case is a supplement to it, and so is the Griffith and the Crescent case. Nothing has hap-
[fol. 5298] pened to the five defendants in the Southern District who own probably nearly 4,000 theatres. They were started long before us and yet they say that we make delays.

The Court: I should think that this whole matter could be submitted on paper.

Mr. McKay: We would like an opportunity to argue, your Honor.

Mr. Wright: You have your opportunity today.

Mr. McKay: We had expected to argue it, but you surprised us. I do not think that a two weeks' adjournment is a very long one.

The Court: I think you will accomplish the same result by submitting it in writing.

Mr. McKay: I do not like to give up the prospect of oral argument without consulting with Mr. Schine and Mr. McClennen. They did not get in here until quite late last night, some time after midnight, and I only saw them for just about a minute before I left to come here. Would your Honor be disposed to grant any adjournment at all, even if only for a week? We do want to argue this.

The Court: If Mr. McClennen is here why had we not better go ahead?

Mr. McKay: Mr. McClennen and I have not had an op-
[fol. 5299] portunity to talk except once since we were here back in February.

The Court: What do you say to a two weeks' delay, Mr. Wright?

Mr. Wright: We would object, if the Court please. There was no excuse, as I see it, for the way this attempted adjournment has been handled at all. As your Honor pointed out he could very easily have called us last week, and we might conceivably have made arrangements to postpone this. The futility of any postponement is this: It is apparent from what Mr. McKay has said here that they do not propose to present to your Honor at the end of two weeks or any other time any plan of carrying into effect this Section 3 of your Honor's judgment. They just want to argue for the third time that there should not be any dissolution here at all, that Section 3 should be declared a nullity and some other kind of negative injunction provisions should be substituted. Those questions, it seems to me, were finally decided by the opinion of March 11th, and I do not see why they should be continually given the opportunity to cover the same ground.

The Court: Why do we not go ahead today, and then you will have an opportunity also to submit a brief further? [fol. 5300] Wouldn't that meet all the exigencies of the situation?

Mr. McKay: It is not the way I would like to handle it.

The Court: You can hear what Mr. Rice has to say and then you can answer it, and submit a brief also.

Mr. McKay: Then I make this suggestion, your Honor, will you hold this until 2 o'clock and allow me an opportunity to consult with Mr. Schine and Mr. McClennen, because I want their opinion as to whether it would be preferable to submit the thing on brief or argument?

The Court: I will give you a chance to do both. You can argue today and submit anything you want.

Mr. McKay: They may prefer to submit the entire thing on brief rather than to have a half of an argument.

The Court: We could finish it this afternoon, could we not?

Mr. McKay: I think so. Supposing you make it one o'clock?

The Court: I cannot do that. I have to be away at that time.

Mr. McKay: I think if we decided to argue we can finish in a comparatively short time.

The Court: We can make it half-past one. I will hold it until that time.

(Whereupon a recess was taken until 1:30 o'clock p. m.)

[fol. 5301] After Recess, 1:30 o'clock P. M.

Appearances: Same as before noted.

Mr. McKay: Your Honor, after consulting with my colleagues, we have decided that we prefer to submit this matter on briefs, in reply to this brief. However, we have one waiver, and I think a more important suggestion, and that is that we have decided in view of what has been said this morning, that we will, if the opportunity is given to us, submit a plan of re-alignment. That, of course, will require more time than the 14 days we would need for a brief, but I think the time would be profitably spent, because we are not going to enter into the preparation of such a plan without in good faith doing our part to work out a plan that we think will be accepted, and at this point I want again to emphasize the fact that we have never arbitrarily stated that we did not intend to submit a plan. We did, as I told your Honor this morning, go to Washington in the hope that we could start discussion looking toward the submission of a plan, and we were discouraged there. Mr. Wright this morning said that Mr. McClennen—in fact he said it twice, that Mr. McClennen had declared that we [fol. 5302] would not submit any plan. Well, I looked up the transcript of the hearing before your Honor, and the interchange occurs at pages 77 to 82, and there is no statement there by Mr. McClennen that we would not submit a plan. What he was pointing out to your Honor was what our position was, and still is, that the submission and consideration of a plan should await the determination of the Supreme Court on the merits of the case. Your Honor ruled against us on that, and so we now say if your Honor will fix a reasonable time within which to give us an opportunity to submit a plan of re-alignment, we undertake to do so.

The Court: What have you to say about it, Mr. Wright?

Mr. Wright: If the Court please, in so far as submission of a plan is concerned, at any time, of course, they can always come in with a plan, even after an appeal is perfected and pending. There is nothing to prevent them by

anything that is done today or at any other particular time which would foreclose them from submitting a plan that they think would be acceptable to your Honor and to us.

The Court: You want it to be presented before adoption by the Court?

By Mr. Wright: I say that there never will be a plan [fol. 5303] submitted by these people that amounts to anything until and unless there is a final judgment of dissolution which actually puts or approves a scheme for a dissolving, re-aligning and re-organizing of the circuit, and it is important I think that there be no further delay in actually implementing the judgment that has been rendered with whatever the Court views as a proper plan to implement it with. On the timing of it I see no reason at all why, if they have anything they want to submit to your Honor, it cannot be submitted within a couple of weeks, within the same length of time that it would take them to answer our reply. Whatever they want to file they are perfectly at liberty to include suggestions of any nature whatsoever, and I suppose they will do it, but in no event should that be made the excuse for deferring the entry of a final appealable order in the case. That I think should be done within the next, say, four or five weeks, so that we do not have any docketing of appeals there in the Supreme Court, so that we can have the matter heard of and disposed of on their appeal from the entire judgment and such cross-appeal that we might elect to take all at one time. There should be no further delay, it seems to me, in actually [fol. 5304] getting a final order. That is the only thing we are concerned with. So far as their submitting a plan to your Honor, they can, of course, do that at the time that they file this memorandum that they say they want to file, and anything we have to say about it, I suppose, could be communicated to your Honor in writing.

I think your Honor has already indicated that there is no occasion for any further hearings before we get to an order.

The Court: That we have and will have is sufficient. The only question I can see now is—of course, you and your associates are very familiar with the whole situation here, and with the examinations you have made of the proposed plan and the prior proposals, it would not be like going into something new, to organize your proposal, so that it can be done, I think, in a reasonable time.

Mr. McKay: It will be done as expeditiously as possible, but in examining that situation from the research Mr. Schine pointed out that a comprehensive plan will require a very considerable amount of work by accountants to determine just how the financial adjustments between the various [fol. 5305] theatres are to be made. What Mr. Wright has said to your Honor presupposes that if we do not put in a plan your Honor is going to approve the plaintiff's plan.

The Court: I do not know what he presupposes, but, of course, the Court has the final say about it.

Mr. McKay: We feel that your Honor will be in a much better position to determine what plan should be adopted if you have before you a plan submitted by us.

The Court: What time do you figure you would want?

Mr. McKay: I think we should have the same time that was provided in the original judgment, and which, I think, should have been carried over into this judgment, and that is 60 days.

The Court: No, I do not think the question of the original judgment has anything to do with the time.

Mr. McKay: The judgment allowed 60 days for the preparation of a plan, and I think——

The Court: We have had that 60 days already, and we still have the matter under consideration. The amendment would not affect it at all.

Mr. McKay: During that time we were considering other matters. We were considering then the question of these amendments to the findings of fact, which we felt had to be disposed of before we could consider what would be the [fol. 5306] next step, and we felt then and still feel that it would be preferable to have the ruling of the Supreme Court on the merits, and the indication of how far the Supreme Court felt we should go before any plan was submitted. Your Honor has ruled against us on that, so that we say——

The Court: You can protect your rights. There could not be any carrying out of the plan before the disposition by the Supreme Court. It could not be carried out.

Mr. McKay: That is true.

The Court: One suggestion that was made, as I recall, by Mr. Wright was that in the event of any delay here that the Court should carry out the provisions of the 1942 decree directing the sale of the balance of 16 theatres that had not been sold.

Mr. McKay: There is no 1942 decree or order any more. That we do not need to discuss any more.

The Court: I suppose the situation is the same now as it was then?

Mr. McKay: Yes, I believe it is. I mean as far as the ownership of the theatres. I would not want to say so definitely, but——

The Court: It seems to me that the question of the plan is a very important thing, that is true. You have known [fol. 5307] of this so long, and you know pretty definitely what you should do I should think in the making of some plan. You could present it in every detail.

Mr. McKay: This is a rather unusual type of case for a plan of this kind, and we would be very reluctant to say to your Honor that we will come in with a plan unless we felt when we did come in with a plan it would be one at least that represented our best judgment as to how these theatres could be re-aligned. It is a very important proposition. I do not think that 60 days is any great length of time. I think in the long run time will be conserved by giving us additional time.

The Court: It will be in the Supreme Court this Fall. That ought to be considered.

Mr. McKay: We have indicated our willingness to expedite the bringing of the case to the Supreme Court by filing the notice, which your Honor now has before you for an allowance.

Mr. Wright: These accounting details that counsel has referred to are nothing that would concern the Court at this time in any event. All the embodying of the plan would be to outline the character of the dissolution. It would not attempt to settle all of those details. I want to [fol. 5308] make myself clear on what I said this morning about when this order became appealable. I do not say that you have to work out all the details before there is an appealable judgment, but you have to have a judgment——

The Court: Some order on it, anyway?

Mr. Wright: Yes; which indicates the kind of dissolution which is to occur. I took the trouble this morning to examine the files in the Eastman Kodak case here in this court, and I noticed the original opinion there which was rendered in November, 1915, did spell out, as your Honor's opinion did here, simply in general terms a dissolution of the monopoly, to create competition, the defendants were then

given 30 days to submit a plan which would effectuate that purpose. Otherwise the Court said it would appoint a Receiver. They came in with a plan which was not acceptable to Judge Hazel within the period, and then in January, 1916, he did enter with an opinion which we referred to in our memorandum a judgment which specified that these two companies should be separated, naming them, but that judgment, of course, then, gave the defendants a further time in which to actually submit a plan for the purpose of accomplishing the mechanics of the dissolution, and that, of [fol. 5309] course, was stayed pending an appeal. Here I would assume that the actual execution of any plan that might be decreed would, of course, be stayed pending the appeal to the Supreme Court. So that there is no occasion for your Honor at this time to concern yourself with these accounting problems which might arise in the course of executing such plan as the Court might outline.

The Court: I will give you three weeks on this. Today is the 16th. I will give you three weeks in which to submit your argument on this motion here, and also if you wish to submit any tentative plan at that time that may be done.

Mr. McKay: That does not involve any commitment on my part.

The Court: That you shall submit a plan? No. You want a week to answer that, Mr. Wright?

Mr. Wright: Yes.

Mr. McKay: When is there going to be an end to this, your Honor. We ought to come in on equal terms.

The Court: We came in today for a proposed argument. I think he should have time to reply. He might want to ask you something.

Mr. McKay: Then if we find anything new in that answer, we will be obliged to ask you for more time.

[fol. 5310] The Court: It would be the same as though you spoke here today. If you spoke he would have an opportunity to reply.

Mr. McKay: We are to submit our brief within three weeks?

The Court: Yes; and also any tentative proposal. If the Court sees merit in your proposals, I would be disposed to give further time to counsel.

Mr. McKay: That is satisfactory, because we will know by three weeks——

The Court: That will be the 7th of May, and you have until the 14th to answer, Mr. Wright.

Mr. Wright: One thing more, if the Court please: I assume this petition for appeal has simply been filed; no order was entered allowing it?

The Court: No. I did not decide whether I should or not.

Mr. Wright: I think the signing of the order should be deferred until after there is a final order entered, and the thing I wanted to point out was that I noticed their petition asked for a stay of the entire judgment, and we would, of course, oppose any stay except as to Section 3 of the judgment, the dissolution.

The Court: You want to file a notice of appeal now? Can you not wait until after the——

Mr. McKay: I am not sure whether we can safely delay [fol. 5311] the filing——

Mr. Wright: They have that 60 days.

Mr. McKay: We are not making a request for supersedeas at this time. Is not the allowance of the appeal automatic?

Mr. Wright: I think the mere filing of the petition stays the time as far as worrying about the 60-day interval. I think the filing of the petition brings them within the time.

The only other thing, I did want to mention a couple of points that were not covered in the written memorandum, and I might as well call them to your Honor's attention so that they will be in the transcript. One point which we did not stress in the typewritten reply, and which I want to make now, had to do with the defendants' assumption that there is no future competition as a possibility in the one theatre communities that are now controlled by Schine, even if those theatres were operated by somebody else. We want to point out that there is no way in which the Court can possibly undertake to determine what the competitive possibilities are in any community, except by creating conditions which make motion picture theatre operat- [fol. 5312] ing conditions possible. As far as this record is concerned, it appears in Medina, Ohio, a town of less than 5,000 people, was one which Schine apparently thought would be a profitable location for a third theatre, although there were already two operating there. And the Town of Perry, New York, you will recall was served by one sizable theatre, and was also regarded by Schine as a likely location for the erection of another theatre. Of course, the

existing operators in both those towns were independent. From common experience we know that almost no town is too small to invite competition as a spot for another theatre, providing only that the existing operator is so firmly entrenched as to be able to freeze out prospective competition by the sort of film buying control that you saw in this case. Only the other day we got a letter——

Mr. McKay: I object to any statement about correspondence.

Mr. Wright (Continuing): —about a town in West Virginia, a little town with less than a thousand people in it. This fellow said somebody had just opened a theatre there and had come in against him.

Mr. McKay: This has nothing to do with the Schine Circuit. It should not go in this record.

[fol. 5313] The Court: That is simply an illustration. The Court has had several communications from people that wanted to buy theatres.

Mr. Wright: It has always been apparent in every community there are enough films for two theatre operations if the operators are willing to operate with comparative profits. You can always make a great deal more money if you have the only theatre in the town, but it is absurd to assume, as the defendants apparently do, that merely because a town has only had one theatre in the past that it is always going to have one theatre in the future, regardless of what other conditions are present.

The other thing that I wanted to emphasize is the—of course, one other reason that some of these one-theatre towns have continued to be one-theatre towns in Schine's hands were the threats which were in evidence in this record, such as you had in Salamanca and Canandaigua; when somebody threatened to come into town they were intimidated by Schine in a threat to put in an additional theatre, which preserved the one-theatre monopoly.

The other point I wanted to say a little bit more about was this question of the defendants' opposition to divesti-[fol. 5314] ture of stock interest in corporations where they are not the sole owners, that is corporations which are partly owned by non-defendants. We pointed out in our memorandum, of course, that they did not have standing to make whatever objections that these other non-defendant interested people might want to make. I wanted to point out in addition now that in the Crescent case after the mandate

came down from the Supreme Court petitions were heard in a couple of cases filed by the other stockholders in these corporations that the Crescent Company divest itself of stock in praying that the divestiture not be carried out, and the District Court denied those petitions in that case.

As I say I do not want to repeat here anything that is said in the reply that we filed, and I think there is nothing more I have to add than that we are here to answer any questions that your Honor might wish to raise on your own motion, and I would like to do that if there is any.

The Court: I will do that after further consideration. I would not want to do it now.

Mr. Wright: That is entirely agreeable.

[fol. 5315] Mr. McKay: I am not going to argue this case any further now, as I told you, but I do want to state that what Mr. Wright has said about Medina and Perry is not so, and we will so demonstrate in our reply. And what he has said about Salamanca and Canandaigua is not so. Those are two-theatre towns, not one-theatre towns.

The Court: I see in running over this you call some attention there with reference to Hornell. It should be Hamilton, as you pointed out. That is the name of the place.

Mr. McKay: We called that to the plaintiff's attention some months ago.

The Court: I do not think that is of any significance whatsoever. Hamilton was mentioned.

[fol. 5316] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

NOTICE OF APPEAL AND PETITION FOR ALLOWANCE THEREOF, AND ORDER ALLOWING APPEAL—April 15, 1946

The defendants, Schine Chain Theatres, Inc., Schine Theatrical Co., Inc., Schine-Lexington Corporation, Schine Enterprises Corporation, Schine Circuit, Inc., Chesapeake Theatre Corporation, J. Myer Schine, Louis W. Schine and John A. May, separately alleging that each is aggrieved by the final judgment entered in the above entitled cause on or about the first day of November, 1945, and by the amended judgment entered on the twenty-ninth day of March, 1946, pursuant to the decision filed herein on the eleventh day of March, 1946, disallowing in part the de-

fendants' motion filed on November 10, 1945 under Rule 52(b) to amend the findings of fact and conclusions of law and the judgment, and allowing in part the plaintiff's motion filed on or about February 1, 1946 under Rule 52(b) [fol. 5317] to amend the findings of fact and conclusions of law and the judgment and by the proceedings on which said judgments are based, do each separately hereby appeal to the Supreme Court of the United States from said judgments and each of them in the respects which more fully appear in the assignment of errors which is filed herewith, and each prays that this claim of appeal may be allowed and that the judgments be superseded and stayed until after the determination of said appeal, and that a transcript of the record proceedings and papers upon which the said decree was based, duly authenticated, be sent to the Supreme Court of the United States.

Schine Chain Theatres, Inc., Schine Theatrical Co., Inc., Schine-Lexington Corporation, Schine Enterprises Corporation, Schine Circuit, Inc., Chesapeake Theatre Corporation, J. Myer Schine, Louis W. Schine, John A. May, by their respective attorneys, Edward F. McClennen, Willard S. McKay.

This appeal is allowed Buffalo, N. Y., April 17, 1946.

John Knight, United States District Judge.

[fol. 5318] In the District Court of the United States

[Title omitted]

Defendants' Assignment of Errors—December 28, 1945, April 15, 1946

Each of the defendants, Schine Chain Theatres, Inc., Schine Theatrical Co., Inc., Schine-Lexington Corporation, Schine Enterprises Corporation, Schine Circuit, Inc., Chesapeake Theatre Corporation, J. Myer Schine, Louis W. Schine and John A. May, assigns as the errors in the record and proceedings in the above entitled case, on which the defendants intend to rely in briefs and argument in the Supreme Court of the United States, the following:

First Assignment

The Court erred in decreeing November 1, 1945 and March 29, 1946 that the defendants and their affiliated corporations be dissolved, realigned or reorganized in their

ownership or control so that fair competition between them [fol. 5319] and other theatres may be restored and thereafter maintained; because this decree was not warranted by the findings of fact and by the evidence, and was contrary thereto.

Second Assignment

The Court erred in its conclusions and judgment that Schine Chain Theatres, Inc. has monopolized and attempted to monopolize the licensing of the exhibition of motion picture films in various cities and towns in violation of sections 1 and 2 of the Sherman Act, and the business of operating motion picture theatres in various towns in violation of the aforesaid statute; because this judgment and these conclusions were not warranted by the findings of fact and by the evidence, and were contrary thereto.

Third Assignment

The Court erred in its conclusions and judgment that Schine Theatrical Co., Inc. has monopolized and attempted to monopolize the licensing of the exhibition of motion picture films in various cities and towns in violation of sections 1 and 2 of the Sherman Act, and the business of operating motion picture theatres in various towns in violation of the aforesaid statute; because this judgment and these conclusions were not warranted by the findings of fact and by the evidence, and were contrary thereto.

Fourth Assignment

The Court erred in its conclusions and judgment that Schine-Lexington Corporation has monopolized and at- [fol. 5320] tempted to monopolize the licensing of the exhibition of motion picture films in various cities and towns in violation of sections 1 and 2 of the Sherman Act, and the business of operating motion picture theatres in various towns in violation of the aforesaid statute; because this judgment and these conclusions were not warranted by the findings of fact and by the evidence, and were contrary thereto.

Fifth Assignment

The Court erred in its conclusions and judgment that Schine Enterprises Corporation has monopolized and attempted to monopolize the licensing of the exhibition of motion picture films in various cities and towns in viola-

tion of sections 1 and 2 of the Sherman Act, and the business of operating motion picture theatres in various towns in violation of the aforesaid statute; because this judgment and these conclusions were not warranted by the findings of fact and by the evidence, and were contrary thereto.

Sixth Assignment

The Court erred in its conclusions and judgment that Schine Circuit, Inc. has monopolized and attempted to monopolize the licensing of the exhibition of motion picture films in various cities and towns in violation of sections 1 and 2 of the Sherman Act, and the business of operating motion picture theatres in various towns in violation of the aforesaid statute; because this judgment and these conclusions were not warranted by the findings of fact and by the evidence, and were contrary thereto.

[fol. 5321] Seventh Assignment

The Court erred in its conclusions and judgment that Chesapeake Theatre Corporation has monopolized and attempted to monopolize the licensing of the exhibition of motion picture films in various cities and towns in violation of sections 1 and 2 of the Sherman Act, and the business of operating motion picture theatres in various towns in violation of the aforesaid statute; because this judgment and these conclusions were not warranted by the findings of fact and by the evidence, and were contrary thereto.

Eighth Assignment

The Court erred in its conclusions and judgment that J. Myer Schine has monopolized and attempted to monopolize the licensing of the exhibition of motion picture films in various cities and towns in violation of sections 1 and 2 of the Sherman Act, and the business of operating motion picture theatres in various towns in violation of the aforesaid statute; because this judgment and these conclusions were not warranted by the findings of fact and by the evidence, and were contrary thereto.

Ninth Assignment

The Court erred in its conclusions and judgment that Louis W. Schine has monopolized and attempted to monopolize the licensing of the exhibition of motion picture films

in various cities and towns in violation of sections 1 and 2 of the Sherman Act, and the business of operating motion picture theatres in various towns in violation of the aforesaid statute; because this judgment and these conclusions were [fol. 5322] not warranted by the findings of fact and by the evidence, and were contrary thereto.

Tenth Assignment

The Court erred in its conclusions and judgment that John A. May has monopolized and attempted to monopolize the licensing of the exhibition of motion picture films in various cities and towns in violation of sections 1 and 2 of the Sherman Act, and the business of operating motion picture theatres in various towns in violation of the aforesaid statute; because this judgment and these conclusions were not warranted by the findings of fact and by the evidence, and were contrary thereto.

Eleventh Assignment

The Court erred in its conclusions and judgment that the defendant Schine Chain Theatres, Inc., has maintained a combination with the other defendants and contracted, conspired and combined with them to monopolize, and for the purpose of monopolizing the licensing of the exhibition of motion picture films in various cities and towns in violation of sections 1 and 2 of the Sherman Act, and with the effect of suppressing competition and monopolizing exhibition of films distributed by each of the film corporations described in various towns and cities in violation of the aforesaid statute; because said conclusions and judgment were not warranted by the findings of fact and by the evidence, and were contrary thereto.

[fol. 5323] Twelfth Assignment

The Court erred in its conclusions and judgment that the defendant Schine Theatrical Co., Inc. has maintained a combination with the other defendants and contracted, conspired and combined with them to monopolize, and for the purpose of monopolizing the licensing of the exhibition of motion picture films in various cities and towns in violation of sections 1 and 2 of the Sherman Act, and with the effect of suppressing competition and monopolizing exhibition of films distributed by each of the film corporations

described in various towns and cities in violation of the aforesaid statute; because said conclusions and judgment were not warranted by the findings of fact and by the evidence, and were contrary thereto.

Thirteenth Assignment

The Court erred in its conclusions and judgment that the defendant Schine-Lexington Corporation has maintained a combination with the other defendants and contracted, conspired and combined with them to monopolize, and for the purpose of monopolizing the licensing of the exhibition of motion picture films in various cities and towns in violation of sections 1 and 2 of the Sherman Act, and with the effect of suppressing competition and monopolizing exhibition of films distributed by each of the film corporations described in various towns and cities in violation of the aforesaid statute; because said conclusions and judgment were not warranted by the findings of fact and by the evidence, and were contrary thereto.

[fol. 5324] Fourteenth Assignment

The Court erred in its conclusions and judgment that the defendant Schine Enterprises Corporation has maintained a combination with the other defendants and contracted, conspired and combined with them to monopolize, and for the purpose of monopolizing the licensing of the exhibition of motion picture films in various cities and towns in violation of sections 1 and 2 of the Sherman Act, and with the effect of suppressing competition and monopolizing exhibition of films distributed by each of the film corporations described in various towns and cities in violation of the aforesaid statute; because said conclusions and judgment were not warranted by the findings of fact and by the evidence, and were contrary thereto.

Fifteenth Assignment

The Court erred in its conclusions and judgment that the defendant Schine Circuit, Inc. has maintained a combination with the other defendants and contracted, conspired and combined with them to monopolize, and for the purpose of monopolizing the licensing of the exhibition of motion picture films in various cities and towns in violation of sections 1 and 2 of the Sherman Act, and with the effect of

suppressing competition and monopolizing exhibition of films distributed by each of the film corporations described in various towns and cities in violation of the aforesaid statute; because said conclusions and judgment were not warranted by the findings of fact and by the evidence, and were contrary thereto.

[fol. 5325] Sixteenth Assignment

The Court erred in its conclusions and judgment that the defendant Chesapeake Theatre Corporation has maintained a combination with the other defendants and contracted, conspired and combined with them to monopolize, and for the purpose of monopolizing the licensing of the exhibition of motion picture films in various cities and towns in violation of sections 1 and 2 of the Sherman Act, and with the effect of suppressing competition and monopolizing exhibition of films distributed by each of the film corporations described in various towns and cities in violation of the aforesaid statute; because said conclusions and judgment were not warranted by the findings of fact and by the evidence, and were contrary thereto.

Seventeenth Assignment

The Court erred in its conclusions and judgment that the defendant J. Myer Schine has maintained a combination with the other defendants and contracted, conspired and combined with them to monopolize, and for the purpose of monopolizing the licensing of the exhibition of motion picture films in various cities and towns in violation of sections 1 and 2 of the Sherman Act, and with the effect of suppressing competition and monopolizing exhibition of films distributed by each of the film corporations described in various towns and cities in violation of the aforesaid statute; because said conclusions and judgment were not warranted by the findings of fact and by the evidence, and were contrary thereto.

[fol. 5326] Eighteenth Assignment

The Court erred in its conclusions and judgment that the defendant Louis W. Schine has maintained a combination with the other defendants and contracted, conspired and combined with them to monopolize, and for the purpose of monopolizing the licensing of the exhibition of motion

picture films in various cities and towns in violation of sections 1 and 2 of the Sherman Act, and with the effect of suppressing competition and monopolizing exhibition of films distributed by each of the film corporations described in various towns and cities in violation of the aforesaid statute; because said conclusions and judgment were not warranted by the findings of fact and by the evidence, and were contrary thereto.

Nineteenth Assignment

The Court erred in its conclusions and judgment that the defendant John A. May has maintained a combination with the other defendants and contracted, conspired and combined with them to monopolize, and for the purpose of monopolizing the licensing of the exhibition of motion picture films in various cities and towns in violation of sections 1 and 2 of the Sherman Act, and with the effect of suppressing competition and monopolizing exhibition of films distributed by each of the film corporations described in various towns and cities in violation of the aforesaid statute; because said conclusions and judgment were not warranted by the findings of fact and by the evidence, and were contrary thereto.

[fol. 5327] Twentieth Assignment

The Court erred in its conclusions and judgment that Columbia Pictures Corporation and the defendants have contracted, conspired and combined with each other with the effect of suppressing competition and monopolizing exhibition of films distributed by said distributor corporation in various towns and cities, in violation of sections 1 and 2 of the Sherman Act; because said conclusions and judgment were not warranted by the findings of fact and by the evidence, and were contrary thereto.

Twenty-first Assignment

The Court erred in its conclusions and judgment that Twentieth Century-Fox Film Corporation and the defendants have contracted, conspired and combined with each other with the effect of suppressing competition and monopolizing exhibition of films distributed by said distributor corporation in various towns and cities, in violation of sections 1 and 2 of the Sherman Act; because said conclusions

and judgment were not warranted by the findings of fact and by the evidence, and were contrary thereto.

Twenty-second Assignment

The Court erred in its conclusions and judgment that Loew's Incorporated and the defendants have contracted, conspired and combined with each other with the effect of suppressing competition and monopolizing exhibition of films distributed by said distributor corporation in various towns and cities, in violation of sections 1 and 2 of the Sherman Act; because said conclusions and judgment were [fol. 5328] not warranted by the findings of fact and by the evidence, and were contrary thereto.

Twenty-third Assignment

The Court erred in its conclusions and judgment that Paramount Pictures, Inc. or Paramount Film Distributing Corporation and the defendants have contracted, conspired and combined with each other with the effect of suppressing competition and monopolizing exhibition of films distributed by said distributor corporation in various towns and cities, in violation of sections 1 and 2 of the Sherman Act; because said conclusions and judgment were not warranted by the findings of fact and by the evidence, and were contrary thereto.

Twenty-fourth Assignment

The Court erred in its conclusions and judgment that R. K. O. Radio Pictures, Inc. and the defendants have contracted, conspired and combined with each other with the effect of suppressing competition and monopolizing exhibition of films distributed by said distributor corporation in various towns and cities, in violation of sections 1 and 2 of the Sherman Act; because said conclusions and judgment were not warranted by the findings of fact and by the evidence, and were contrary thereto.

Twenty-fifth Assignment

The Court erred in its conclusions and judgment that United Artists Corporation and the defendants have contracted, conspired and combined with each other with the [fol. 5329] effect of suppressing competition and monopolizing exhibition of films distributed by said distributor cor-

poration in various towns and cities, in violation of sections 1 and 2 of the Sherman Act; because said conclusions and judgment were not warranted by the findings of fact and by the evidence, and were contrary thereto.

Twenty-sixth Assignment

The Court erred in its conclusions and judgment that Universal Pictures Company, Inc. or Universal Film Exchanges, Inc. and the defendants have contracted, conspired and combined with each other with the effect of suppressing competition and monopolizing exhibition of films distributed by said distributor corporation in various towns and cities, in violation of sections 1 and 2 of the Sherman Act; because said conclusions and judgment were not warranted by the findings of fact and by the evidence, and were contrary thereto.

Twenty-seventh Assignment

The Court erred in its conclusions and judgment that Warner Bros. Pictures, Inc. or Vitagraph, Inc. and the defendants have contracted, conspired and combined with each other with the effect of suppressing competition and monopolizing exhibition of films distributed by said distributor corporation in various towns and cities, in violation of sections 1 and 2 of the Sherman Act; because said conclusions and judgment were not warranted by the findings of fact and by the evidence, and were contrary thereto.

[fol. 5330] Twenty-eighth Assignment

The Court erred in its conclusions and judgment that Schine Chain Theatres, Inc. had, as a means of monopolizing contrary to sections 1 and 2 of the Sherman Act, used predatory practices; because this judgment was not warranted by the findings of fact and by the evidence, and was contrary thereto.

Twenty-ninth Assignment

The Court erred in its conclusions and judgment that Schine Theatrical Co., Inc., had, as a means of monopolizing contrary to sections 1 and 2 of the Sherman Act, used predatory practices; because this judgment was not warranted by the findings of fact and by the evidence, and was contrary thereto.

Thirtieth Assignment

The Court erred in its conclusions and judgment that Schine-Lexington Corporation had, as a means of monopolizing contrary to sections 1 and 2 of the Sherman Act, used predatory practices; because this judgment was not warranted by the findings of fact and by the evidence, and was contrary thereto.

Thirty-first Assignment

The Court erred in its conclusions and judgment that Schine Enterprises Corporation had, as a means of monopolizing contrary to sections 1 and 2 of the Sherman Act, used predatory practices; because this judgment was not [fol. 5331] warranted by the findings of fact and by the evidence, and was contrary thereto.

Thirty-second Assignment

The Court erred in its conclusions and judgment that Schine Circuit, Inc. had, as a means of monopolizing contrary to sections 1 and 2 of the Sherman Act, used predatory practices; because this judgment was not warranted by the findings of fact and by the evidence, and was contrary thereto.

Thirty-third Assignment

The Court erred in its conclusions and judgment that Chesapeake Theatre Corporation had, as a means of monopolizing contrary to sections 1 and 2 of the Sherman Act, used predatory practices; because this judgment was not warranted by the findings of fact and by the evidence, and was contrary thereto.

Thirty-fourth Assignment

The Court erred in its conclusions and judgment that J. Myer Schine had, as a means of monopolizing contrary to sections 1 and 2 of the Sherman Act, used predatory practices; because this judgment was not warranted by the findings of fact and by the evidence, and was contrary thereto.

Thirty-fifth Assignment

The Court erred in its conclusions and judgment that Louis W. Schine had, as a means of monopolizing con- [fol. 5332] trary to sections 1 and 2 of the Sherman Act,

used predatory practices; because this judgment was not warranted by the findings of fact and by the evidence, and was contrary thereto.

Thirty-sixth Assignment

The Court erred in its conclusions and judgment that John A. May had, as a means of monopolizing contrary to sections 1 and 2 of the Sherman Act, used predatory practices; because this judgment was not warranted by the findings of fact and by the evidence, and was contrary thereto.

Thirty-seventh Assignment

The Court erred in enjoining the defendants from monopolizing the supply of major first run films in any situation where there is a competing theatre suitable for first run exhibition thereof, and from monopolizing the supply of second run films in any situation where there is a suitable theatre for second run exhibition thereof; because this injunction was not warranted by the findings of fact and by the evidence, and was contrary thereto, and was too general and indefinite in terms and in excess of any appropriate remedy.

Thirty-eighth Assignment

The Court erred in enjoining the defendants from demanding or receiving clearance over theatres operated by others, which unreasonably restricts their ability to compete with a theatre owned or operated by a defendant or [fol. 5333] corporation controlled by it and from attempting to control the admission prices charged by others by agreement with distributors, demands made upon distributors, or by any means whatsoever; because this injunction was not warranted by the findings of fact and by the evidence, and was contrary thereto, and was too general and indefinite in terms and in excess of any appropriate remedy.

Thirty-ninth Assignment

The Court erred in enjoining the defendants from conditioning the licensing of films in any competitive situation outside of Buffalo, New York upon the licensing of films in any other situation and from entering into any film franchise; because this injunction was not warranted by the findings of fact and by the evidence, and was contrary

thereto, and was too general and indefinite in terms and in excess of any appropriate remedy.

Fortieth Assignment

The Court erred in enjoining the defendants from selling or acquiring any theatre interest, pending the further order of this Court; because this injunction was not warranted by the findings of fact and by the evidence, and was contrary thereto, and was too general and indefinite in terms and in excess of any appropriate remedy.

Forty-first Assignment

The Court erred in enjoining the defendants from enforcing any existing agreements heretofore entered into [fol. 5334] (1) not to compete or (2) to restrict the use of any real estate to non-theatrical purposes; because this injunction was not warranted by the findings of fact and by the evidence, and was contrary thereto, and was too general and indefinite in terms and in excess of any appropriate remedy.

Forty-second Assignment

The Court erred in enjoining the defendants from using any threats or deception as a mean whereby a competitor is induced to sell; because this injunction was not warranted by the findings of fact and by the evidence, and was contrary thereto, and was too general and indefinite in terms and in excess of any appropriate remedy.

Forty-third Assignment

The Court erred in enjoining the defendants from continuing any contract, conspiracy or combination with each other or with any other person which has the purpose or effect of maintaining the exhibition or theatre monopolies of the defendants or of preventing any other theatre or exhibitor from competing with the defendants or any of them, and from entering into any similar contract, conspiracy, or combination for the purpose or with the effect of restraining or monopolizing trade and commerce between the states; because this injunction was not warranted by the findings of fact and by the evidence, and was contrary thereto, and was too general and indefinite in terms and in excess of any appropriate remedy.

[fol. 5335] Forty-fourth Assignment

The Court erred in entering findings of fact, conclusions of law and judgment drafted and submitted by plaintiff's attorneys without affording to defendants' attorneys any opportunity to present objections thereto or to propose changes therein or pertinent additions thereto, or any opportunity to be heard thereon, and notwithstanding the fact that said findings of fact, conclusions of law and judgment were not warranted by the facts found and by the evidence, and were contrary thereto.

Forty-fifth Assignment

The Court erred in not granting in its entirety the defendants' motion filed November 10, 1945 to amend the Findings of Fact and Conclusions of Law entered by the Court on or about November 1, 1945, and in the several particulars in which it was not granted.

Forty-sixth Assignment

The Court erred in granting in part the plaintiff's motion filed on or about February 1, 1946 to amend the findings of fact and conclusions of law and the judgment entered by the Court on or about November 1, 1945 and in the several particulars in which said motion was granted.

Forty-seventh Assignment

The Court erred in making findings of fact and quotations based exclusively on the papers erroneously admitted in evidence and described in the forty-eighth assignment of [fol. 5336] errors. These findings and quotations are set out in the Findings of Fact drafted by plaintiff's attorneys and entered by the Court on November 1, 1945, particularly in paragraphs 17, 8 and 9 thereof particularly as to clearance.

Forty-eighth Assignment

The Court erred, at the close of the evidence for plaintiff, in admitting in evidence by a single ruling, and in denying defendants' motion to strike out and to limit the effect so that they would not be taken as evidence of the truth of the statements contained in them, the exhibits listed below, notwithstanding the fact that all that had appeared as to who fabricated them was that in compliance with a subpoena the respective distributor corporations, not defendants, had directed a search of files in their respective

home, district and branch offices and had produced them by a designated officer or employee who had no further knowledge concerning the papers produced. There was no evidence as to who, if any one, dictated them, who wrote them, who, if any one, signed them, or that they were uttered, sent or received by any one. There was no evidence that any opinions stated in them were those of a qualified person or within the scope of the duties of any person. There was no opportunity to examine or to cross examine any witness concerning the papers or the opinions or other statements in them. There was no evidence that any of these papers had gone from or to any of the defendants or were known to them. Most of the papers were framed like internal memoranda within the respective distributors. There was no evidence that any one of these papers was [fol. 5337] an act in furtherance of any conspiracy. On the contrary, many of them disclosed non-cooperation and competitive antagonism. The defendants' objections covering all these matters, and separately as to each paper, were summarized and stated at length in the record at typewritten pages 3285-3288, 3589-3610, 3424-3458, 3941-3963. The ruling is at typewritten pages 3610, 3612, 3955-3964.

The list of the exhibits so admitted is as follows:—

76	216	300	369	430	530
163	218	307	370	435	542
164	226	308	374	444	546
165	227	310	381	456	549
166	228	318	383	459	554
167	229	319	386	476	559
168	230	321	387	488	560
169	236	322	388	494	561
170	243	323	390	497	566
171	259	338	393	499	574
172	273	356	396	500	597
173	282	361	397	518	598
176	283	363	412	519	599
178	286	366	413	526	600
179	288	367	425	527	601
190	292	368	426	528	662

Respectfully submitted for each defendant separately, Edward F. McClennen, Willard S. McKay, Attorneys for Defendants.

[fols. 5338-5339] In United States District Court

[Title omitted]

Defendants' Motion for a Stay

The defendants, severally, move the Court to stay any and all acts or proceedings herein taken or attempted to be taken pursuant or purporting to be pursuant to the second and third sentences of Paragraph III of the Judgment entered herein on the 1st day of November, 1945, on the ground that said provisions of said Judgment were stricken and eliminated therefrom by the Amended Judgment, entered on the 29th day of March, 1946, and that there now exists no warrant or authority for any action under said provisions or either of them.

Respectfully submitted, Willard S. McKay, Attorney for the Defendants-Severally.

Dated: New York, New York, April 5, 1946.

[fol. 5340] In United States District Court

[Title omitted]

Transcript of Hearing

Proceedings before Honorable John Knight, United States District Judge for the Western District of New York, May 8th, 1946, at 9:30 o'clock a.m., Buffalo, New York.

Appearances: Honorable George L. Grobe, United States Attorney for the Western District of New York, by R. Norman Kirchgraber, Esq., Assistant U. S. Attorney, appearing for the United States.

Willard S. McKay, Esq., 630 Fifth Avenue, New York, N. Y., and Samuel S. Isseks, Esq., 30 Broad Street, New York, N. Y., and Howard M. Antevil, Esq., Gloversville, New York, appearing for the Defendants.

[fol. 5341] Proceedings

Mr. McKay: I have, with Mr. Isseks, who has had a lot of experience, and Mr. Ferguson, who has been our accountant for 25 years, been doing the best I could to work out what I think is a workable plan. We have been somewhat

handicapped, No. 1, because Mr. Isseks is recently in the case and, No. 2, Mr. Ferguson's father has undergone a serious operation which kept him in Washington and unavailable for a week, and he is going under another one today or tomorrow, but I do honestly feel what I gave you last night represents something that will accomplish what I think you want to accomplish in this case, and what I would really appreciate is any suggestions you might have, where you see some places where it could be improved upon, or any objections, so that I can try and bring it more in line, if possible. When I told you we were trying to work out a plan, I meant that exactly, and we were going to do everything possible to arrive at a result to accomplish what, in your opinion, you said you wanted to accomplish, of course, always reserving the right to appeal on the merits.

The Court: The one thing, of course, that suggests itself to me and naturally to you, is that you are retaining the [fol. 5342] same control all the way through, through a family division. While you say it is an independent interest, "Present beneficial owners"—you divide them into two groups, the wives of the two principal owners at the head of the other group.

Mr. McKay: That is true, and as I told you yesterday, that is in line with the re-organization approved by the Supreme Court in the Crescent case. In that case the principals were Mr. Sudekan, his son-in-law, and his wife, and there has been no disturbance of the stock ownership, except the son-in-law is to own all the stock in one, Mr. Sudekan is to own all the stock in another, and the wife in another, and incidentally just about a week ago Mr. Sudekan dropped dead, and that is going to seriously complicate that plan, but that hasn't anything to do with this case. I take it, particularly in line with the cases that the Government cited, in no case was the ultimate stock ownership disturbed. It was simply the management or control that was segregated. In our case, we have provided for separate control of the theatres in New York by one individual, we have provided for separate control of the theatres in Ohio by another individual, and separate control in the remainder of the theatres by the two other individuals which I think complies with what the courts have [fol. 5343] decided in the past and your decision, and particularly so when it is combined, not only with the injunctive

provisions in the judgment, but with the suggestions we have indicated our willingness to have.

Mr. Kirchgraber: Yesterday after this was submitted to our office, I called Mr. Wright in Washington, and, as well as I could over the phone, explained to him the two proposed re-alignments on this, plan 1 and 2, so I merely tried to explain to him, which is a difficult job, just what they had in mind on the change, and Mr. Wright said as far as he could see it did not materially alter the present situation, and he would like to have a week or ten days to look this over before making any formal objections, but he said tentatively it would not change the present situation.

Mr. Isseks: If your Honor will look at Chart III, which is the proposed re-alignment plan 2, you will note that it divides the present theatres into three different companies, based on the different localities from which they buy their products. Of course, I am new in this thing, but as I read your Honor's opinion, your Honor was primarily trying to break up this so-called large buying power, film buying power, the Schine Circuit. This breaks that effectively. [fol. 5344] You have separate corporations, with separate buying power. Secondly, this plan is on a traditional basis following the tobacco case and the Standard Oil case. I realize in those cases they had hundreds of stockholders, if not thousands of stockholders. What they did there—take the tobacco case, the American Tobacco Company had bought out ten or twelve different tobacco companies. Along came the Government and said "That is a monopoly." The Supreme Court said it was. They said "You have to break it up into four companies", but, they said, "The stockholders in the present company will each be entitled to the same beneficial interest in the four companies". We have provided here that the present beneficial owners shall be the same beneficial owners in these three new companies. Your Honor says that the control will be the same. We have provided that there will be no interlocking officers or directors or voting trustees in either company. The only place where there would be united control would be through the beneficial owners. Mr. McKay said he was willing to adopt any suggestions or modifications that your Honor has in mind with regard to that problem of the control, but we have provided here that there shall be no interlocking control. The [fol. 5345] only control would be through the fact a person retains stock interest. If your Honor has any other sug-

gestions in mind, I gather from Mr. McKay, he would not only be willing to consider them, but propose to adopt them, but this is traditional.

The Court: Under that plan, of course, a voting trust agreement could be changed at any time.

Mr. Isseks: No, sir.

The Court: By a majority.

Mr. Isseks: No, sir. It is within your Honor's supervision. You have to have a ten-year voting trust under the New York law. It could be clear and unequivocal and, of course, we did not make it clear—we intended to, that it can be subject to your Honor's approval.

Mr. McKay: That was definitely intended.

The Court: You would not string this along under the supervision of the Court.

Mr. Isseks: Let me make another suggestion. Apparently Mr. Wright, whom I know very well, wants some time to consider this thing. That is fair enough. During that period of time why don't we try to meet any objections your Honor has by submitting something to you and to Mr. Wright.

[fol. 5346] The Court: I know nothing about Mr. Wright, except as just stated. The fundamental question, it seems to me, is the question of retention of family control. You point out the Crescent case, but there, there was a greater separation. I am not clear about that myself, but that is the thing that immediately struck me.

Mr. Isseks: We had in mind, your Honor, while the beneficial ownership would be in the present two stockholders, that by separate voting trusts for a period of, let us say, ten years, which we did not spell out here, you would have a separate control of each unit in the trustee, but there again I think we had in mind to consider any suggestions made either by your Honor or the Government.

Mr. McKay: The beneficial owners, as such, would have nothing except the right to get dividends. They have no control under their character as beneficial owners.

Mr. Isseks: As your Honor knows, in these various cases in the Supreme Court and elsewhere, the courts have made it clear that there is no intention to penalize in any decree under the Anti Trust Laws, the beneficial owners, or no intent to penalize them. They are the only two beneficial [fol. 5347] owners. Your Honor's point is that they should not be able to control. We recognize that. We do not dis-

pute it. That is why we set up voting trustees. We could, during this interval that Mr. Wright wants to consider the plan, perhaps, amplify the question of control——

The Court: You say nothing here about any ten-year provision for continuation of the trust control or the control of the Court at all, do you, in this proposal?

Mr. Isseks: No, we did not.

Mr. McKay: This was gotten up under considerable pressure, and that is why it was put in as a tentative proposal. We know there are plenty of things that need to be supplied, and we are entirely conscious of that.

The Court: I have not examined his plan much at all. I just looked roughly through the provisions of the way it is treated, but what I wanted to do first was to set these all down separately and show just where they are in each state and also show just what relation the various corporations have to these various situations. You have divided it first into the real estate corporation and leasing corporation, operating corporation, buying and booking corporation, service corporation. That is the present setup.

Mr. McKay: There will be more than one operating [fol. 5348] corporation in the present setup. Those are the categories in which they fall.

The Court: Does this first list include any of those in the 1942 decree?

Mr. McKay: He has a separate paragraph, your Honor, as to the 1942 decree in his plan. Nearly all of the theatres in the 1942 decree have been disposed of already except about four, and we have explained those in our objections. Of course, the 1942 decree, that was simply a method of bringing our status back to the status at the beginning of this suit.

The Court: That brings me to an inquiry, and the point of my inquiry is the question—I don't recall what the effect of the 1942 decree is—it was generally applicable to all of the theatres, wasn't it, so far as any continuation of clearance and things of that kind?

Mr. McKay: The provisions of the 1942 decree applied to the whole circuit. That is my understanding, that that decree was an order, so designated, a "Temporary Order," that ran out on November 15th, 1944. It had no further effect after that date, and at that time we had disposed of all of the theatres except Cumberland, where your Honor had stated, when the Department allowed us to acquire one

[fol. 5349] theatre in Cumberland—your Honor said he could not see the logic of disposing of one and acquiring another. In Mount Vernon the lease expired, and there was half interest in Harlan, where the other half owner came in and testified that he was very much opposed to anybody being in business with him. He did not want the half interest back, and there were two small theatres in Lexington and one in in Malone we were not able to sell, as we reported the day after the expiration of the order.

The Court: What is the status of the Paramount case?

Mr. McKay: Nobody knows when that will be decided, and on that I might point out I have read—I cannot say I have read all the briefs, but I have most of it, and as far as I can see the Government in that case is not asking that anything happen to these theatres except that they be separated from distribution. In other words, if I am correct—I am not making it as a definite assertion— I am saying that is as far as I have been able to see in my examination so far—what happens if the Government gets what it wants in that case would be that these five circuits the present distributors have would still remain as circuits, but they would be separated from the distribution part of the business, but each one of these circuits is much larger than the [fol. 5350] Schine Circuit, so it would seem funny that those units which are very much more powerful than we are could continue to operate as circuits when we could not. Mr. Schine from the very start of the case has always taken the position that he is perfectly willing to conduct his business in the same manner as the rest of the industry does, if there is a standard set. They tried to set a standard back in 1933 under the N.R.A., and he subscribed to that standard, and it was thrown out. During the period that that was effective, he signed what they called the Motion Picture Industry Code, and conformed to the practices of the Code, and he would do it again if it were standard, but it does seem to be unfair that he should be singled out and asked to do business on a basis that nobody else in the eighteen thousand theatres in the United States does.

The Court: What is his idea, to let you pick out one theatre out of this group?

Mr. McKay: What he says is, every town where we have two theatres, we can keep one and we have to sell the other, and we can choose the one we want to keep.

The Court: There are two in each of these towns?

Mr. McKay: At least two.

[fol. 5351] The Court: That is not so. There aren't two in Perry.

Mr. McKay: Those are the one-theatre towns that you are reading (referring to papers).

The Court: Yes, you are right about that. I had forgotten about that.

Mr. McKay: He says where there is only one theatre in a town we have to give up the town.

(Court reads from plan).

Mr. McKay: The only towns of these single theatre towns that were mentioned in the opinion or findings—I have not attempted to read the 4700 pages of the record—but the only towns mentioned in the opinion or findings were Perry, and there was one other, I believe—all of that is analyzed completely—Carthage was mentioned. Those were the only ones.

The Court: East Rochester was mentioned.

Mr. McKay: Not East Rochester, just Rochester.

The Court: Wasn't East Rochester mentioned?

Mr. McKay: No, East Rochester as a suburb of Rochester was not mentioned. If you throw East Rochester into the Rochester neighborhood houses, as we think it should be, then you might say it was mentioned in connection with Rochester, but what was objected to in Rochester was those Madison, Webster and Monroe Theatres, and as to [fol. 5352] those he suggests we give up two of those houses.

The Court: There is a separation as to what you call East Rochester and suburban.

Mr. McKay: Yes, and also Fairport is in the same category.

The Court: Perry and Carthage, as you say. Also Milford and Laurel.

Mr. McKay: I don't think Milford was mentioned and Laurel was mentioned indirectly. I think there was a mention of Laurel in Ayre's testimony. I don't think that was in the findings of fact. There was only casual mention of it.

The Court: Is there any change in the situation of any of those theatres since the trial?

Mr. McKay: The biggest change happens in Carthage. The theatre that was there when the trial was had burned down, and he has just about finished a new theatre which is

much nicer. Under this plan we have to take the theatre and turn it over to somebody else.

The Court: In the list of the two-theatre cities is there any change?

Mr. McKay: In the two-theatre towns I don't think there is any change. The theatre has burned down in Salisbury.

The Court: Do you have both theatres in Salamanca?

Mr. McKay: Yes, we have both theatres in Salamanca.

[fol. 5353] The Court: Have you looked this over to determine what you would concede could be done to meet the plan in so far as it relates to the divestiture of any of these theatres?

Mr. McKay: Our reply deals separately with each town, and in our opinion we don't think that the sale of any of these theatres should be ordered. We don't think that it is called for by the opinion or the decision. We feel that by a plan such as we have suggested, embodying a separation of control and the injunctive provisions, you will get everything that you want to assure you that the Act will be complied with. We pointed out several times after the consent order was signed in 1942, there hasn't been any complaint about the conduct of our business. Nobody has made any complaint, and no evidence was offered at the trial, which was two years later, so that—and Mr. Wright, at the opening of the trial, said he assumed that the consent order had been performed. That leaves us to the natural thought, if we not only take the provisions of that consent order, but elaborate on them and add this separation of control we have suggested, we are going to present to your Honor a plan that will go far beyond anything that has ever been accomplished in an anti-trust case so far.

[fol. 5354] The Court: Of course, the consent decree was made after the action was brought.

Mr. McKay: Yes, but as you very correctly stated and as Judge Hand repeated about two weeks after your opinion—Judge Hand said practically the same thing, that this dissolution remedy is very harsh, and he said the Court probably would not apply it—you said the Court should not apply it, or words to that effect.

The Court: I said "re-alignment."

Mr. McKay: I think this is proper re-alignment, and particularly so when it embodies everything and more than

was in the consent order, which obviously worked, because it did away with all complaints from 1942 through to the start of the trial. I don't believe there have been any complaints since. I have not heard any.

The Court: Of course, even that might involve disposition of some theatres. Some situation might be more aggravated than others.

Mr. McKay: I have yet to see any such situation that I could call really aggravated. Even the people who testified here at the trial, most of them, admitted that they had not been harmed. Nobody has come in here and showed any damage to that particular person resulting from any con-[fol. 5355] duct by Schine. Their complaint was primarily that they could not get what they wanted. Nobody can get what he wants. We don't get what we want, either.

The Court: Of course, you have to take a long range view, you might say.

Mr. Isseks: As Mr. McKay pointed out, these injunctive provisions, your Honor, provided for in the judgment and in your opinion, would prevent in future any kind of a situation that your Honor found reprehensible. The question on the re-alignment could be handled on traditional methods, the way they did in the tobacco and Standard Oil case and the duPont case and International Harvester case. In none of those cases, and those are the well known monopoly cases, did they direct the sale of any of the properties. It was suggested when the Government applied for modification in the International Harvester case that there be some sale of properties, but the Supreme Court said "No." They said "When you realign the properties" as they did there. Our situation here is we have three companies. The only question your Honor raised is whether the control would still be the same. As to that we thought we would avoid that by having separate voting trusts and [fol. 5356] provisions that there be no interlocking directors or officers or even having the same kind of office space in the building, and we would have separate independent booking which your opinion indicates was the thing most improper and tended most to restrain trade so far as independent theatres were concerned. Under this plan we have in mind no one unit would be very large, and there would be many more independent units larger than any one of these units. I think if Mr. Wright wants some time, and we be given some time to work out details, perhaps your Honor

would indulge us a period of time for all of us to be here and perhaps we could do what your Honor indicated, that the parties sit down and see what we could work out. We would then be in a position to take up every item in their plan which we found goes beyond the decided cases, and we could discuss the two plans and perhaps come up with a third plan.

The Court: I think the way to handle it now in view of what Mr. Kirchgraber said would be to let Mr. Wright submit in writing what he wants to submit in a week, to answer the plan, and then I will determine the question of whether we have to get together to consider the matter [fol. 5357] further. When he gets that in, I will see what he has.

Mr. Kirchgraber: Will your Honor hold it for some particular date for Mr. Wright to get in whatever he would like to get in?

The Court: You said a week.

Mr. Kirchgraber: I think he will be able to get it in a week; a week from today?

The Court: I will give you what time you want, any reasonable time.

Mr. Isseks: You said ten days.

Mr. Kirchgraber: I think ten days would be better.

The Court: I have not done much with it because of the fact that you were going to submit something. Time was given to submit something.

Mr. Isseks: The 17th or 18th.

The Court: A week from next Monday would be all right. That would be the 20th.

Mr. Isseks: Will your Honor consider tentatively at least setting down a hearing for the 28th, and we could come in with Mr. Wright. I think if we had him here and had his objections we could come back on the 28th or the 27th, either one, and we could all sit down and perhaps suggest something to your Honor that would be feasible.

The Court: All I had in mind was that perhaps there [fol. 5358] might not be any necessity of that, if we had your papers in here. I don't know as it makes much difference.

Mr. Isseks: We don't mind coming back the 27th or the 28th.

The Court: What is your idea?

Mr. Kirchgraber: I would submit this to Mr. Wright, and I think perhaps by that time he would be able to come up here, by the 28th.

Mr. Isseks: Why not set it down for the 28th?

The Court: We will hold this. Let him submit his memorandum by the 20th.

Mr. Kirchgraber: And we come back on the 28th?

The Court: That would be the 27th. I guess you better make it the 28th.

Mr. Isseks: The 27th is on a Monday. The 28th is on a Tuesday. 10 o'clock?

The Court: Yes. In the meantime—I have not examined your brief much because I have been waiting to get these cases that you discussed in your brief, the Harvester case——.

Mr. Isseks: Your Honor, that is in the new briefs that we are going to file today.

The Court: I mean the one you filed before.

Mr. McKay: Those have not been cited before, but this brief discusses each town very carefully. Would your Honor want some extra copies?

[fol. 5359] Mr. Kirchgraber: Have copies of that been served?

Mr. McKay: Yes, you have those. I will leave one extra and send a couple more up.

The Court: That is already filed here?

Mr. McKay: Yes.

Mr. Isseks: This is the reply brief that discusses all the cases.

Mr. Kirchgraber: Mr. Wright has a copy?

Mr. Isseks: No.

Mr. Kirchgraber: Then would you give me two, please?

Mr. Isseks: We will get their brief on the 20th, and we will be here on the 28th with as much as we can possibly work out on our plan, and we will try to meet the objections your Honor has raised today.

The Court: I think you ought to go into as much detail as you can, unless you have it sufficiently clear.

Mr. McKay: I don't think it is.

Mr. Isseks: No, it is not. We will have something for your Honor.

The Court: Are they still operating under this consent decree, I mean, the arbitration provisions?

Mr. McKay: The arbitration provisions of the decree, the last I saw, were extended for six months.

The Court: To what date?

Mr. McKay: I think it runs until about November.

[fol. 5360] The Court: This year?

Mr. McKay: Yes, and the defendants were willing to continue that provision indefinitely. In the appendix to that brief I have included a report from the arbitration association. That shows how it has worked. Mr. Wright before the Three-Judge court took a slightly different position. He now says there should not be any clearance at all.

The Court: That is what he stated in here. You said here (reading from papers), and then you go on and say here referring back to what Mr. Hayes says, "The plaintiff may now argue, reversing the position previously taken by it with respect to clearance, as indicated by the quotation from Mr. Hayes at page 11 supra, that clearance per se is illegal."

Mr. McKay: He supported the arbitration provision, but in the answer to an inquiry from Judge Hand on the argument before the Three-Judge Court, Mr. Wright said that clearance should be abolished entirely. That was last January.

The Court: He said "In that connection it has long been felt both by exhibitors and by distributors that there is no fairer way to handle and dispose of complaints concerning clearance than to have the clearance fixed by some impartial arbitrator."

[fol. 5361] Mr. McKay: That is what Hayes says.

The Court: "Those of us who have worked on this decree after reviewing, as I said at the very beginning, the numerous industry problems in all their ramifications with the Government representatives keeping constantly before their eyes, as was their duty, the complaints of exhibitors and the complaints of public groups are of the opinion that the decree is a desirable forward step." Where do you say Mr. Wright has taken the position now that he is in favor of abolition?

Mr. McKay: That is exactly what he did in arguing to Judge Hand. That is the statement of Mr. Wright.

The Court: That he had not thought that there should not be any clearances, but now so thinks.

Mr. McKay: He now thinks that there should not be any clearances. One time he had not thought that there should not be any clearances. Now he does think that there should not be. That is what he told Judge Hand. I don't know whether he will take that position here or not, but he did, in answer to a specific inquiry from Judge Hand, state that there should not be any more clearance.

The Court: I don't know whether he was correctly understood in that statement or not.

[fol. 5362] Mr. McKay: It was regarded so significant that it was published in headlines by all the trade papers.

The Court: It was?

Mr. McKay: Yes, I will be glad to send you a copy. It was considered in the industry as a very significant statement.

The Court: Your situation is that you don't need anything of that kind.

Mr. McKay: My suggestion is, even though we were not bound by the Southern District decree, we have submitted every case that came up, and we are willing to continue it. Back in the N. R. A. we had arbitration about clearances, and we submitted every dispute that there was then. We have never refused to arbitrate a clearance dispute with anybody, and we think that is probably a cheap, inexpensive and quick way of getting a determination of what is a fair clearance.

The Court: When was the Paramount case finally submitted?

Mr. McKay: The briefs were submitted around the first of January. It was argued for about four days. I think it ended January 16th or 17th.

The Court: There ought to be an opinion pretty soon.

Mr. McKay: I understand none of the judges,—Judge Goddard, Judge Bright and Judge Hand—none of them [fol. 5363] have taken any assignments, so they must be working on their opinion.

The Court: Judge Hand has taken assignments.

Mr. McKay: Not within the last month. That is Augustus Hand.

The Court: That might be so.

Mr. Isseks: It is pretty clear neither Judge Goddard nor Judge Bright have sat since then in a district, and it apparently clear Judge Augustus Hand has not sat since then.

The Court: We will leave the matter. Is there anything else you want to discuss today?

Mr. McKay: I wanted to ask your Honor a couple of questions about the record. I spoke to Mr. Wright last night. We filed a precipe and Mr. Wright has filed a counter precipe, and Miss Sickmon is concerned about the amount of work involved in preparing this record to be sent to the Clerk of the Supreme Court. You know that the record is actually printed by the Clerk of the Supreme Court. What the clerk here does is certify the record and send it down and then he takes charge of the printing. We have supplied copies of practically everything that we had designated in our precipe and we will supply the rest.

[fol. 5364] The Court: What is his proposal? Don't you agree on that?

Mr. McKay: Mr. Wright has designated a lot of papers in addition to the ones we have designated. It seems to me some of them are unnecessary, but I will try to work that out with Mr. Wright, and I don't know what the forum is in which it can be determined. I suppose if either side were to contend a certain paper should be printed, he would be entitled to have it printed. How could you know you had a fair record before the Supreme Court unless it was printed? There is a penalty for unnecessary papers that are printed. The offending party has to pay the cost. That is all the penalty there is.

The Court: I don't know why there should be any confusion about it. It seems to me your stenographic record and papers would show.

Mr. McKay: We designated the entire stenographic record and asked to have all the exhibits sent to Washington without copying, because we have got to arrive at some method to handle those exhibits. There are three thousand exhibits, most of them printed contracts. Your Honor can see that it would be impossible to hand up a record with every one of those contracts printed, but in Mr. Wright's counter precipe he has designated what I would consider [fol. 5365] collateral and interlocutory matters not a part of the actual trial or the controlling decision.

The Court: Motions you mean?

Mr. McKay: Interim reports that were filed with regard to the consent order. We designated the consent order, but he designated interim reports.

The Court: It would not make any difference to you if it were put in.

Mr. McKay: Except I think the printer in Washington is pretty expensive. I tried to give the job to the man up here, but I found I could not. I do understand, however, if there is any real dispute, your Honor, this Court is the forum to which we should bring it. If I cannot agree with Mr. Wright, I have no reason to think that I cannot agree, I will submit what I think should be eliminated.

The Court: There should not be any trouble about it. The only question is whether they are material.

Mr. McKay: That is the whole thing. I think some of these things have no bearing on the ultimate result, and I think it would be advisable to leave them out of the record.

[fols. 5366-5368] IN UNITED STATES DISTRICT COURT

[Title omitted]

DEFENDANTS' MOTION FOR ORDER TO TAKE FURTHER TESTIMONY

The defendants move the Court for an order decreeing that prior to the approval or adoption by the Court of any method of compliance with Paragraph III of the amended judgment, hearings be held at which testimony may be taken relevant, pertinent and necessary to the consideration of the method of compliance with Paragraph III of the said judgment and of plans submitted by the respective parties or any amendments or modifications thereof, and in the Court's discretion that a Master be appointed for the purpose of such hearings.

In making this motion the defendants do not waive their right to claim that any further order of this Court with respect to the performance of paragraph III of the amended judgment herein prior to the determination of the appeal herein by the Supreme Court of the United States is premature, which claim has been heretofore made and is now specifically reserved.

Respectfully submitted, Willard S. McKay, Attorney for the Defendants.

Arthur Garfield Hays, of Counsel.

Dated: New York, New York, May 22, 1946.

[fol. 5369] In United States District Court

[Title omitted]

Supplemental Affidavit of Arthur Garfield Hays

Arthur Garfield Hays, being duly sworn, says:

This affidavit is submitted to supplement the motion papers previously served and filed herein.

Under the amended judgment of March 29, 1946, no provision was made for the submission of plans by either party. The plan of the plaintiff was filed pursuant to the provisions of the original judgment. That has been superseded by the amended judgment, which makes no provision for the submission or consideration of any plan whatever.

In view of the fact that an appeal to the Supreme Court has been taken and allowed, which defendants are prosecuting with all reasonable speed, no procedure looking towards the adoption and enforcement of a plan of any kind should be taken until after that appeal has been determined.

However, defendants, without prejudice to their contentions as aforesaid, and without prejudice to their contention that they have not violated the law, are willing to cooperate in an endeavor to explore the possibilities of a plan of realignment even while the appeal is pending. They be-
[fol. 5370] lieve, however that a consideration of any such plan is not proper on the basis of the facts now before the Court, and that it is essential to take testimony in order to determine what plan would properly conform with the terms of this Court's judgment (if it should, contrary to defendants' contention, be sustained by the Supreme Court) and at the same time protect the legitimate interests of the defendants. The reasons why defendants ask for this hearing of testimony as to the facts are in short as follows:

At the trial, the testimony was confined to the plaintiff's endeavor to show that there had been a violation of law in the past, to wit: during the period preceding May 19, 1942. That testimony, as the Government readily admits, did not attempt to cover all of the localities or all of the theatres involved. The findings and opinion deal with only a limited number. Any plan must concern itself with the specific conditions affecting each of the theatres and each of the localities which would be affected by the plan.

As appears from the opinion of the Court, the case of the Government rested on these main considerations: circuit buying power, clearance, franchises, and the manner in which the various theatres had been acquired and operated. Particularly with reference to clearance and franchises, the testimony taken at the trial in no way reflects the present existing situation. Moreover, in order to understand the effect of circuit buying presently it is necessary to understand the relationship of defendants' theatres to the industry as a whole, as of the present time.

As stated, the plan proposed by the Government deals [fol. 5371] with circumstances in about 70 different localities. It is obvious that more than half of these were not discussed in detail at the trial at all. The Court, therefore, is wholly without information concerning the present day situation in these localities. As an illustration—the plaintiff's plan proposes that in order to carry out the purposes of the judgment that Theatre A in Town B should be sold. It is the only theatre in the town, or in the near vicinity. There never was competition there and there is no competition today. Why did the Government choose this particular theatre? What are the facts? None appear in the record. No plan of realignment or reorganization can be intelligently arrived at except after factual presentation relating to such plan and its effects upon competition. The testimony at the trial was in no way directed to this end.

Actually, the formulation of a plan should first be preceded by an examination into the facts upon which any conformity with the Court's judgment rests. It is easy just to submit a plan. The plaintiff's plan proposes the selling off of theatres arbitrarily. This, the Court has already characterized as a harsh remedy which should be avoided. It would work a hardship on the defendants without accomplishing any legitimate purpose intended by the judgment —in letter or in spirit.

Defendants are not seeking to retry the case. They realize that their remedy on this score is in the Supreme Court. But the generality of the testimony which was adduced at the trial in an attempt to show that there had been illegal restraints can in no wise now be adopted and enlarged upon to show that such restraints will continue unless the [fol. 5372] drastic alleged remedy proposed by the plaintiff in this plan be adopted. Plaintiff is acting like a witch

doctor who is trying to exercise the devil by killing the patient.

In amplification of the foregoing, defendants refer particularly to the discussion of the individual situations contained in the objections to plaintiff's plan previously filed by defendants on April 1, 1946. The facts stated in those objections are hereby incorporated into and made a part of this application. Commencing on page 17 and continuing through page 104, there is a brief discussion of each of the localities in which defendants are operating a theatre or theatres, approximately 70 localities in all. The facts set forth indicate the nature of the evidence which should be produced at hearings and which is appropriate for the Court's consideration of any proposed plan. We submit that either the Government admit the facts therein stated and others that defendants wish to show, or preferably that defendants have an opportunity to prove them and make them a part of the record. The mere statement of the Government that these facts do not throw light upon the plan should not prevent the defendants from making them a part of the record.

It is obvious, as the Government itself admits in the appendix to the Reply to Defendants' Objections, that the only evidence produced at the trial concerned facts tending to establish a violation and to "point the way" to the remedies required to correct them. Therefore, since the evidence at the trial merely pointed the way, it is obvious that the proper remedy cannot be determined until that evidence can [fol. 5373] be brought up to date and supplemented. No better example can be given of this than the position taken by the Government in its Reply to Defendants' Objections which states in the appendix:

> "The plaintiff's Proof in this, as in any antitrust case, was *confined to that thought sufficient to establish the violations charged* and point the way to the remedy required to terminate them. Likewise, the Court's opinion and findings were even more selective in embracing only what was necessary to support the judgment. Thus, the defendants' general assumption that any facts not explored by the proof or the Court's opinion were favorable to them is untenable on its face. Their further effort to *supply facts* which they regard

as favorable to them in situations *where the record is silent* by mere assertion of counsel, also requires no reply."

We are not attempting to quibble over what facts were or were not in the record at the trial. The approach to the problem is entirely different now because *the problem is different:* There, the Court and the parties were concerned, as the Government readily admits, with facts tending to show violations of law. Here, we are concerned with not merely "pointing the way" to a remedy but with laying down the facts upon which conformity with the amended judgment must soundly rest. The ready analogy which comes to mind is that of a criminal prosecution. The prosecutor establishes a record to show violations of the law; after conviction it is the duty of the Court to pass sentence. The Court as a matter of practice never refuses to hear all of the facts bearing on the question of sentence. This is not obviated merely because a record has been established as to the violation of the law itself.

It is submitted that the defendants should not be deprived of the opportunity of supporting any plan proposed by them with testimony directed to the relevant, pertinent [fols. 5374-5375] and necessary facts. In like regard, a factual basis should be afforded for the consideration, if any, of the plaintiff's plan. For example, under the plaintiff's plan, an effort is sought to compel defendants to get out of certain towns entirely? But opportunity should be afforded to establish the facts with regard to the present conditions existing in those towns or to the competitive situation in and concerning these localities.

In conclusion, therefore, the defendants contend that without the taking of further testimony it will be impossible to make a direction to carry out the terms of the Court's judgment which would be related to the actual facts and protect the public and defendants alike. Defendants suggest that, as has been done in similar cases, the Court consider the advisability of appointing a Master to take this testimony and to render his report thereon.

On the foregoing considerations, we submit that the defendants' motion should be granted.

Arthur Garfield Hays.

Sworn to before me this 27th day of May, 1946.
Frederick Griffin, Notary Public, New York County.
Comm. expires 3/30/48.

[fol. 5376] IN UNITED STATES DISTRICT COURT

[Title Omitted]

Transcript of hearing.

Proceedings before Honorable John Knight, United States District Judge for the Western District of New York, at the U. S. Court House, Buffalo, New York, Tuesday, May 28, 1946, at 10 o'clock.

Appearances: Honorable George L. Grobe, United States Attorney for the Western District of New York, and James R. Privitera, Esq., Assistant U. S. Attorney, of counsel, for the United States of America.

Willard S. McKay, Esq., and Hays, St. John, Abramson & Schulman, by Arthur Garfield Hays, Esq., and Seymour M. Heilbron, Esq., and Howard M. Antevil, Esq., of counsel, for the Defendants.

[fol. 5377] PROCEEDINGS

The Court: There seems to be no appearance on the part of the Government. What is the status of the matter?

Mr. McKay: I was in Washington yesterday, your Honor, and I phoned Mr. Wright's office, I tried to reach Mr. Wright, he was in the building, but not in his office, and I told his secretary that I wanted to be sure that Mr. Wright understood that Mr. Hays and I would be present this morning pursuant to the hearing that had been previously set and to the notice of motion which was served last week, and the secretary said that Mr. Wright so understood. I didn't speak to Mr. Wright personally. He wasn't in his office at the time I called.

Also Mr. Hays yesterday sent a telegram to Mr. Wright——

The Court: There is no change in the date, then?

Mr. McKay: No change in the date, no, sir.

The telegram reads, "Re U. S. vs. Schine Judge Knight will hear argument at hearing tomorrow, May 28th at 10 a.m., Buffalo, as heretofore noted. Arthur Garfield Hays."

The Court: Well, a little while ago I called up Mr. Kirchgraber, who had some contact heretofore with the matter. [fol. 5378] He is the first Assistant District Attorney. I don't know whether he wants to appear or not. He had not had any advice to appear.

Mr. McKay: Of course, our information was that Mr. Wright had previously said he would leave the matter to Mr. Kirchgraber. And Mr. Penney, who was in communication with your Honor yesterday, informs me that on talking to Mr. Kirchgraber, Mr. Kirchgraber simply said that he would rely on my having notified Mr. Wright, which I had promised to do, and which I did.

The Court: I called him. He said he was tied up with some people there. I don't know whether he is coming up or not.

(Subsequently Mr. George L. Grobe and Mr. James R. Privitera appeared in person in the court-room).

The Court: Your discussion today is to be directed to some specification of the plans in the outline heretofore laid down or submitted by you?

Mr. McKay: We have two matters to take up with your Honor today. The first is that we have here in final form our proposals regarding re-organization, re-alignment, [fol. 5379] which was submitted previously only tentatively. We are now making a formal submission, subject, of course, to the reservations which we have stated regarding the jurisdiction.

The Court: Yes.

Mr. McKay: And I will hand a copy to your Honor and a copy to the Clerk. (Presenting copies to the Court and to the Clerk). I have here a copy for the other side, and I will see that it is delivered to Mr. Kirchgraber.

In this plan we have not withdrawn either of the two plans previously submitted, but we have added a third alternative in which we have split up not only the control and management of the separate corporations, but the beneficial ownership, so that under Plan 3, which appears on Chart 4, at Page 9, of the proposal, the separate corporations would be separately owned—not only separately controlled, but separately owned—one by J. Meyer Schine, one by Louis Schine, one by the two wives.

Now, this plan 3, in our opinion, falls squarely within the re-alignment which was approved by the Supreme Court in the Crescent case. In that case the ownership of the circuit [fol. 5380] was split up into circuits, one of which was owned by Tony Sudekum, the founder of the circuit, another by Kermit Stengel, his son-in-law, another by Mrs. Sudekum, and another by a man by the name of Rosenbaum, who had

formerly been a partner of Mrs. Sudekum, and I think that, as far as the physical setup of this circuit permits, we have met the Crescent decision, and we have gone beyond the Crescent decision, because in our proposals with respect to arbitration of clearances, we have taken care of what seemed to us to be one of the most troublesome questions before your Honor on the trial of this case. We have proposed that we will come in under the arbitral system now in operation under the Paramount decree, and thereby afford any exhibitor who feels he has a grievance with respect to clearance enjoyed by us a speedy and inexpensive forum for fixing what is fair clearance.

The Court: Well, assuming the effect of the Paramount decree were taken away in some way, supposing that decree were vacated, or you might say died, or went out of existence, what would you provide in that event?

Mr. McKay: Well, we have suggested in this proposal, your Honor, that with respect to cases not falling under the [fol. 5381] Paramount decree we are willing to abide by arbitration under the rules of the American Arbitration Association, which we think to be the fairest forum that exists, aside from the forum set up under the Paramount decree for the determination of such disputes.

Obviously we, as a small circuit, are not in a position by ourselves to establish and maintain the machinery that has been established and maintained under the Paramount decree.

The Court: Of course, that wouldn't be necessary as long as that decree continues, probably.

Mr. McKay: No. But we are hopeful that system will continue. Your Honor will have noted in the discussion contained in the arguments before the three-judge court that it was continued subject to the further order of the Court.

The Court: It probably will continue in that or some other form.

Mr. McKay: Yes. Now, your Honor, you have also before you at this time a motion made last week about the possibility of taking extra testimony, and if I may, I would like to defer further consideration of this present submission until you have heard Mr. Hays on his motion.

[fol. 5382] The Court: All right.

Mr. Hays: If your Honor please, this is a motion to have testimony taken either by your Honor or by a Special

Master, of evidence which we deem to be necessary in connection with the approval of any plan.

I have been in this case, your Honor, only about ten days, but I have read most of the material that has been supplied to the Court recently, and the first matter that confused me was how any Court could make any decree on facts that were proven as to the situation as it existed in 1942, whereas the decree must be, in fact, of today and have to do with the future.

The Government proposes a plan by which Schine is to be divested—they use the euphonious word "dixestiture", but actually it seems to me more like a confiscation—to be divested by about 70 per cent of its circuit. I don't see any provision in the opinion or the judgment by which such action is to be justified, but anyway, if there is to be a restoring to competition, it seems to me that we ought to have some facts upon which to base it.

Even a Government official, clothed with the power and [fol. 5383] authority of the Government, can't say, for instance, "Here, you do this to restore competition", and competition will be restored.

In various towns Schine has one theatre, and the Government blithely says "Our purposes will be carried out if you sell that one theatre." Where this prophecy comes from, I don't know, that if Schine sells the one theatre in a town in which there is only one theatre that competition will be restored.

The Court: Well, it isn't solely a question of restoration of competition. The question is, perhaps, a question of punishment. The Court has found a violation of the Anti-Trust Law. Assuming that the evidence pertaining to a single theatre town, the theatre owned by Schine, disclosed that as a result of their conspiracy or their actions somebody has been wiped out of existence, it wouldn't simply be a question of competition; it would be a question of penalizing the defendant under those particular circumstances because of his acts.

Mr. Hays: Your Honor, I would have more patience with the Government's plan if they had said "Wherever you have destroyed the competition we want you to sell the theatre and restore competition." If the Government had [fol. 5384] limited their plan to those towns where the evidence shows that we have destroyed competition——

The Court: Well, there are those towns, of course, concerning which the evidence was not concerned, that is very true.

Mr. Hays: Yes. And the Government in its plan proposes to sell theatres in various towns to which the evidence didn't refer at all.

The Court: That is very true.

Mr. Hays: I think the evidence referred to some 32 towns at the most, and the Government has proposed that we sell theatres in a number of towns where there is only one theatre in the town and concerning which no evidence has been taken. Besides, it seems to me, your Honor, the cases do not support the theory that the decree should be based on the ground of penalty, and I don't think the Government makes the argument they should be sold as a penalty. I think their claim is that it is remedial and their argument is that they should be sold to restore competition.

The Court: Well, of course, I am speaking of those single theatre towns in which the evidence showed competition had been eliminated by the acts of the defendant. It could be [fol. 5385] restored there. I am not saying anything now about those towns concerning which no evidence had been given.

Mr. Hays: Well, that would apply only to a small number of theatres. But, as I say, even there they don't base the plan on that theory. They simply make the statement that where there is one theatre in a town, that theatre must be sold, and I don't know what their theory is.

The Court: Well, they don't do it in all the single theatre towns?

Mr. Hays: Not all, but practically all. They leave us only about 30 per cent of the theatres we had before. If Schine sells the only theatre in a town where the population couldn't support more than one theatre, how would that have any effect in restoring competition? You may have a town where there is one theatre owned by Schine, and within another town a short distance away there may be other theatres in competition with him. How will the sale of that theatre by Schine restore competition?

For instance, in the section where I live, your Honor, in New Rochelle, there is one theatre. In Mt. Vernon there are perhaps two. Those cities are about five miles apart. [fol. 5386] In between are Pelham and Larchmont, each with one theatre. Certainly, no restoration of competition

would be effected by the sale of the one theatre in New Rochelle, if New Rochelle has never supported more than one theatre.

In this motion all I am asking your Honor to do is before you approve a plan to have some testimony taken not only as to whether the plan in general is sound, but specifically whether it is feasible in the light of conditions existing at present.

For instance, the Government has suggested another category of towns where there are two or more theatres owned by Schine. No evidence has been taken to prove whether the other theatres in those towns are competitive with the two theatres he owns. A good example is in Eastern Maryland, where you have the negro problem. One theatre may be for white, one may be for negroes. Those theatres are not in competition. Where do we have a record of such facts on which we could argue on appeal that the plan is unsound? There is no record.

The Court: The point is, haven't we gone all over this on the trial, the very question you raise? It is true, if you [fol. 5387] had two theatres, one for colored, one for white, they wouldn't be in competition. But that would apply in the South only; it wouldn't apply here. Weren't those things all brought out on the trial of the case itself? We went over this question of competition, the factors involved, clearances, and so forth.

Mr. Hays: Oh, I don't want to raise that again. My point is that you can't arbitrarily say that because there are three theatres in a town that those theatres necessarily would be competitive, and, therefore, Schine should be compelled to sell one of them; that it takes evidence before you can come to that conclusion. My point all the way through is that you have a very different problem in connection with the decree than you have in connection with the trial of the case itself.

The Court: Well, that might be so. You bring up a broad question, whether the Court has power to just separate these theatres in any way it wants to without any proof regarding the question of competition, location, and things like that. And you bring up the point, in the single theatre towns where there is no evidence of any competition and where there is nothing in the record bearing on the question of [fol. 5388] the necessity of eliminating those towns from the circuit, whether that should be done without taking evi-

dence. I look at it broadly. But if you have a situation in a town of say three theatres owned by Schine, and the proposal by the Government is that Schine be left one and sell the others, and we have the evidence in the case—I am assuming we have; I am not speaking of those cases where we haven't the evidence—we have evidence showing the conditions in that town, you wouldn't want to take evidence on that situation, would you?

Mr. Hays: No, I shouldn't in such cases, except where we have conditions in 1946, which are different than they were in 1942.

The Court: Well, that is another question.

Mr. Hays: But my point is that unless you have the facts, it is impossible to tell whether or not we have a fair plan.

May I read this statement by the Government? It makes my argument very clear. In speaking of the case, the plaintiff said, "The plaintiff's proof in this, as in any anti-trust case, was confined to that thought sufficient to establish the violations charged and point the way to the remedy re-
[fol. 5389] quired to terminate them. Likewise, the Court's opinion and findings were even more selective in embracing only what was necessary to support the judgment. Thus, the defendants' general assumption that any facts not explored by the plaintiff or the Court's opinion were favorable to them, is untenable on its face. Their further effort to supply facts which they regard as favorable to them in situations where the record is silent, by mere assertion of counsel also required no reply."

Well, the Government is right in that where we in our brief state that things are so, you merely have the assertion of counsel. How are we going to establish the fact to prove that the Government's plan is unfair and confiscatory and not, as they claim, that it is the object to restore and maintain competition? We can't do it unless we have a basis of fact. And, if we go up on appeal, not only from the judgment but also from the approval of a plan, what facts have we in the record to show whether or not the plan worked out is an equitable one? What we want to do is to prove those facts.

In your Honor's opinion you refer, for instance, to the [fol. 5390] situation of clearances having been changed. Well, we want to show and prove how the situation has been changed. I think I have made a note here of your Honor's statement about that in the opinion. Your Honor

said, "The violations herein are alleged to have occurred prior to the date of the Consent Decree. There is now no method by which either party can compel arbitration. The action taken in the adoption of the Consent Decree and the present availability of arbitration by agreement, however, do have a bearing on the extent of the judgment or decree to be made herein."

Now, there is nothing in the record showing what the present arbitration situation is, or what has happened in that respect, and that is one of the features on which your Honor laid a great deal of stress. There is no evidence in the record, for instance, as to the franchise situation today. I understand there are no franchises any more. There is no evidence in the record of many of the evils you referred to. There is no record, largely because of the action of the Government against the big companies.

The Court: Assume we have found these violations and [fol. 5391] practices have ceased since the trial commenced. That wouldn't lessen the liability of the defendant?

Mr. Hays: If it is a matter of penalty, no.

The Court: Well, I know, but there is a charge of violation of the Sherman Act. Of course, the mere observance of the Sherman Act after the event wouldn't excuse what went on before, would it?

Mr. Hays: Well, your Honor, if the Government had said that in those towns where the Court found unfair competition something has to be done, I could understand the basis for that. But the Government in its plan proposes nothing of the kind, and that is what troubles me, because if they did, then we would know on what the Government based its desire that certain theatres be sold. Now we don't know at all.

The Court: Of course, there might be some force in that argument.

Mr. Hays: May I refer your Honor to Hartford-Empire Co. vs. United States, 323 U. S. 386, where Mr. Justice Roberts said, "We may not impose penalties in the guise of preventing future violations."

And in the Aluminum Company case Judge Learned Hand said, "Dissolution is not a penalty but a remedy; if the in- [fol. 5392] dustry will not need it for its protection, it will be a disservice to break up an aggregation which has for so long demonstrated its efficiency."

I have thought throughout these cases that there was no question of penalty here; that the question was one of remedy: How one would do away with competition which violates the law or how one would create a setup which restored competition. So I never thought of the plan as a penalty. But if the Government had said "We want certain theatres sold because you gained those theatres by illegal means", it wouldn't be in accordance with these cases, and I might protest against it, but at any rate I would know what the basis was on which the Government wanted the theatres sold. As it is, I don't know.

For instance, after they get through divesting us the Government still feels we have too many theatres left, so they have under "F" a plan by which if there are theatres within 25 miles of each other that are owned by Schine they must be sold. There may be dozens of towns in between and dozens of theatres in those towns. Conditions may indicate that there is a great deal of competition and that that com-
[fol. 5393] petition should stand. But the Government attorneys blithely say, "We want those theatres sold because we don't like the situation." They give us no reason for it, nor do they give facts.

What has always troubled me, your Honor, is that we lawyers are inclined to be reasonable men, but as soon as any of us get into Government employ we acquire an aura of authority and power and think our prophecies are sacrosanct. Who are these men who so blithely would take away property which had been built up over a period of thirty years without even giving a reason and apparently, as they oppose this motion, say, "We don't want you to put the facts in evidence!" How is it that men suddenly become omniscient and infallible when they come into Government employ? When the authority is stripped of them they are just lawyers. How can they say, "We don't want evidence"?

I notice up there (indicating) this sign which says "Justice". I have been in this case ten days, and I am so fed up with hearing in reply to every suggestion I make, "You are trying to delay this case. Delay! Delay! Delay!"

Well, I know that totalitarian methods don't delay, but
[fol. 5394] they rarely work out justice. Democratic methods do.

I am saying right now to your Honor that if there is evidence taken in this case it won't be for the purpose of delay. There won't be any time taken that I don't think is necessary for the protection of my client. After all, that sign should read "Justice", not "Speed".

What are we asking for here? We are asking that evidence be presented before your Honor signs a decree that a great many theatres should be sold whether that sale accomplishes a purpose or not—theatres picked out at random because the Government says, "You should lose just so and so many. You shouldn't own more than 30 per cent of what you now have."

And what do we come down to? Today conditions are very different than they were in the thirties, when business was bad. In the thirties you had a buyer's market, where there was an oversupply of product and the buyer could dictate terms and take advantage of his competitors. Today you have not only a seller's market, where the terms are dictated by the sellers, but you have a situation in this [fol. 5395] business where the big companies are wary of government attack. They don't show favoritism. There isn't any danger of the situations and abuses as they existed before returning under these conditions.

There is no evidence on any of these points because when the Government tried this case they just pointed the way to the fact that we have violated the Sherman Anti-Trust Law. And yet they go far beyond the facts to penalize us, even though the Courts say that the purpose of the law is not one of penalty, but the purpose is one to restore competition. As a matter of fact, if it were a question of penalty, you could fix a fine. You might fix a fine of a hundred dollars, a thousand dollars, or a hundred thousand dollars. The property involved may be worth millions of dollars. Is there any basis of fact in the record for that? Does it depend on past violations? Not at all. "We think you should be just as big and no bigger."

Now, the other violations that existed before 1942, because of the change in the industry, most of them have been done away with. The only one that can't be met is possibly buy-[fol. 5396] ing power. I submit the only plan to correct that situation is the one that we have submitted, and that is to divide up this corporation into three corporations, which we have proposed to do, and manage those three corporations separately.

The Government says, "Nonsense. It is merely a sham. These people still own their property.". But the Government fails to realize that competition comes about through management, not through stock ownership. When the big corporations were divided up in the past, time and again the new corporations were set up through the same stockholders, and it was found that by separate management, by the zeal of one management to show its superior ability over the others, was competition brought about—not in one week, not in two weeks, but over the course of years.

A few years ago I was in Russia, your Honor, where at the beginning everybody said lawyers won't be needed in twenty years; ownership is all in the Government; competition will be eliminated. Yet I found industry A competing with industry B. They were all fighting among themselves. Everybody had the zeal to show the unique ability of his management over the others.

[fol. 5397] In this plan we have created the situation where we have divided up our buying power. And, after all, that is some sacrifice to us. But it will do a great deal to restore competition. It isn't necessary to take away from us and compel us to sell a great deal of our property. But whatever the final outcome is, even assume our plan is approved, it will require evidence to support it—not a mere statement of what we intend to do, but evidence upon which to base it in fact.

All I am asking for in this motion is a thing which I should think would be granted without very much consideration, and the Government's absence here today leads me to believe that they don't feel very seriously opposed to it. All this motion amounts to is a request that testimony be taken from which your Honor can determine should a theatre here be sold and should a theatre there be sold.

I would suggest that your Honor personally take the testimony, except that it might be advisable to have a Master who can go to one town or another and thereby make it possible to explain the situation and make it more clear to [fol. 5398] the Court.

We are ready to take this testimony at any time, and I hope that after almost a lifetime at the Bar I have at least established a good enough reputation so that the Court will realize my sincerity when I say that neither this nor any other motion we make will have in it any purpose of delay. But I don't see how we can present this situation or how the

Court can consider a plan, how we can have an appeal, unless the Court will consider the evidence, and that is what I ask the opportunity to do.

The Court: Of course, so far as many of these situations are concerned, evidence has been taken to show conditions there. There are, as you have pointed out before, certain smaller towns where there are single theatres and concerning which there is no proof. I remember the first town listed, I think, in the Government's proposed re-organization plan. That starts out with Bath. Was there any evidence whatsoever concerning that town, Mr. McKay, to show how the theatre there was controlled?

Mr. McKay: The evidence was such, apparently, as to not warrant any mention in either the opinion or the findings.

[fol. 5399] The Court: I know, but I am going back of that. Is there any evidence in the record?

Mr. McKay: There was apparently no evidence, except such as was furnished by answers to the interrogatories, which simply stated that we bought the theatre, The Babcock Theatre, in 1944.

The Court: It doesn't say how it was purchased, what the conditions were, or what else there is about it?

Mr. McKay: There was no evidence offered. This information is obtained from our answers to the interrogatories, and that is all the evidence in the case.

The Court: Well, I spoke of that only because it was named first there and because of its being included as a single theatre town, and I have noted what you have said in your brief. I didn't recall any testimony with reference to the conditions at Bath.

Mr. McKay: There was no testimony.

The Court: Supposing you were to have a reference to take proof on the conditions at Bath. What more would you know than you know now?

Mr. Hays: You would know the character of the community, you would know whether the community supported more than one theatre, you would have evidence concerning comparable towns to find out if they supported more than one theatre.

[fol. 5400] The Court: The question isn't whether the community can support more than one theatre, is it?

Mr. Hayes: No, except that the theory of the Government is that in single town theatres if the theatre is sold it would restore competition.

The Court: It occurs to me that in cases like that there would be no need for the taking of proof, because the inclusion of such towns must be based upon the whole record in the case. You may say that as a result of the finding of violation of the Act the sale in such towns is proposed as more of a re-organization or divestiture. But it doesn't look to me as though we are concerned in towns like that with the single factor of competition as a reason for the sale. I am not saying I am against the inclusion of such towns.

Mr. Hays: Let me read what the Government says, "The proposed sale of the theatres listed in Section I, in paragraph 'a' ", that is one-theatre towns, "divests the defendants of established monopolies in one-theatre closed towns by opening these towns to competition in the only sense possible."

In other words, the only basis they give for selling the theatres in 'a' is that if the defendant sells the theatres in [fol. 5401] the one-theatre towns, it will open competition. How?

The Court: They assume that if the defendant continues there he will drive others out. The Government assumes he will monopolize.

Mr. Hays: If Schine sells his theatre and somebody else comes in you will still have one theatre. How does his selling the theatre restore competition?

The Court: Leaving Schine in Bath today doesn't prevent some other theatre going in there.

Mr. Hays: It would prevent some one else from going in there?

The Court: No, it wouldn't.

Mr. Hays: No, it wouldn't. But suppose Bath is a community that would sustain only one theatre, and suppose you could show comparable towns of that kind in the vicinity that, with or without Schine, can't support more than one theatre?

The Court: Well, I mean you can presume that Bath is a town that supports one theatre.

Mr. Hays: And could support only one?

The Court: I say, assume that.

Mr. Hays: No. I want to prove the facts to show whether that is so or not, because certainly no competition is restored by Schine selling the one theatre unless he was [fol. 5402] preventing another theatre from setting up there.

The Court: Well, my feeling is that the Court would be justified in eliminating that town without such proof, irrespective of any other result of the judgment, because there is no proof now, standing alone, except the bald fact that here is a town of one theatre, and the population of the town is shown.

Mr. Hays: I don't think the Court should eliminate that theatre. I think the Government should put in its evidence supporting the rationality of its plan. I don't feel that we can take the chance that your Honor will eliminate a theatre in a town like that when there is no evidence. We want to put in the evidence to show this plan wouldn't work out.

The Court: My argument is along the line of your own, but the sense of it is that under the general provisions of the law and the findings of the Court, the Court would have the right, in order to re-align and re-organize the corporation, to do what you say it shouldn't do without taking any proof of the conditions there.

Mr. Hays: I don't see how the Court could do it. The Court has the power, but I don't see how the Court can take the responsibility without having before it the conclusions [fol. 5403] of fact. I feel the Court should of its own motion ask for evidence before it takes a position that might destroy the value of a great deal of property, because, mind you, under the Government's plan not only are we compelled to sell; we are compelled to sell under the most onerous conditions. We don't have a free market. The consideration will not be the price; it will be the effect on competition. Not only that, the sales must be speedy, and the Government suggests an agent should sell our property under conditions that are the most audacious I have ever seen. The whole thing seems to me outrageous and so contrary to all known theories of disposing of property, that we should have an agent to sell our property and his commission should depend upon his speed in disposing of our property. And why? "Because you didn't observe the Consent Order of 1942."

Now, I have read the briefs on that. There is a conflict of fact as to what happened. Mr. Schine's position is that he did observe that decree so far as it was possible for him to do so. When I go up on appeal the higher court may have one attitude or another toward whatever pressure [fol. 5404] was put on Schine to sell the theatres provided for in the decree. But a great deal will depend upon whether

he observed the order of 1942 in good faith, and I have no evidence on which to argue that.

The Court: Didn't that decree include a stipulation that those theatres be sold, and wouldn't that have some bearing on the question?

Mr. Hays: Oh, yes. The whole thing, all the facts I would like to prove could be proved by stipulation.

The Court: I am speaking about a past stipulation. There was a stipulation made on which these 16 theatres were directed to be sold. That was done, I suppose?

Mr. Hays: Well, I suppose. They sold 12 or 13 of them. They had difficulty getting rid of the others.

Mr. McKay: 11 of them.

Mr. Hays: 11 of them, and it has been a matter of record here. But I don't know whether the record on appeal would show those facts if we wanted to present them to the higher court. I do know there is no record on any of the disputed facts that appear in the Government's brief and ours.

The Court: You would have the benefit of that on appeal. If it were necessary to have shown in this case the necessity of selling those five theatres you would have the benefit of [fol. 5405] it, if it were necessary to be shown, and it was not shown on the trial.

Mr. Hays: How would I have the benefit of it?

The Court: Because of the lack of proof.

Mr. Hays: But the Government claims that my client has been contumacious in not living up to an order. My client's claim is that he acted in good faith. There is no record on it one way or the other. Is the higher court going to assume that my client is lying or that the Government is wrong, when there is nothing in the record showing one way or the other?

The Court: Well, it wouldn't be perhaps strictly a question of being contumacious. The question in my mind is whether they, having stipulated to sell these theatres, it is not consistent with the status of the matter today that that stipulation should be carried out.

Mr. McKay: If I may interrupt for a moment on that point, your Honor. The Consent Order to which we stipulated required in effect that we use our best efforts to carry it out. At the time of the starting of the trial Mr. Wright conceded in open court that the order had been observed. The order was about to expire and your Honor extended [fol. 5406] the order for six months, during which time we

got rid of four additional theatres, and your Honor provided at that time for a final report, and your Honor reserved to the plaintiff the right to renew its motion for a trustee if it appeared that we hadn't used our best efforts to get rid of these remaining theatres.

We filed our final report the day after this order expired, and nothing happened. The plaintiff did not make any attempt to renew its motion, and we were entitled to assume at that time that we had done everything that we were required to do under the order which expired and was of no further effect after November 15, 1944.

Fifteen months later the plaintiff comes along and is using the fact that there were remaining a few theatres that we weren't able to sell under the terms of the order, and doing everything possible to persuade your Honor to impose confiscatory terms on us, not only as to those theatres but as to every other theatre that we have.

His last paper filed in this case is based almost entirely on a wholly fallacious claim that we didn't observe or re- [fol. 5407] spect the terms of this order. And I want to say on that point, your Honor, that I stood here in open court when that order was presented to your Honor and stated that we were only entering into that order at that time not because of any wrongdoing, but because we felt, and the Government agreed with us, that after just having entered into the most serious war that we had ever become involved in, our time and the Government's time and the Court's time should not be taken up by this case.

That was the basis on which this order was entered, not because we admitted we were wrong in taking over those theatres. The plaintiff got the benefit of an injunction *pendente lite* to maintain the *status quo*, which it had previously tried to get from your Honor on a motion and which the Court had denied. And then he comes along, months later, and says that we are contumacious and have not observed the order.

Mr. Hays: You see, your Honor, my difficulty is that in reading these briefs I find these statements of fact concerning which there is no evidence in the record. All the evidence that was taken on the trial was not taken to point the way toward what should be done to curing a situation [fol. 5408] the Government alleged was illegal.

If your Honor will permit me just two further comments: At one time the Government apparently had the same

theory as is in your Honor's mind today, that something should be done to compel the defendants to sell theatres in those specific instances where the defendants were found to have violated the Anti-Trust Act. I quote the Government's brief of November 26, 1944, "It may be necessary to order the sale of specific theatres in each town where the defendants were shown to have eliminated previously existing competition to the end that such competition may be restored."

Now, then, if they had made a plan on that, at any rate, I might be able to argue to the Court that the plan should not be based on that theory; that the purpose of the law is not one of imposing penalties. In any event, I would know that we have a pure question of law. But obviously the Government has gone much further, and has changed its mind, and is asking for a so-called divestiture in any number of towns concerning which there is nothing whatever in the record.

And then finally, in support of my argument, I should [fol. 5409] like to quote from a statement Mr. Wright made on April 16th. A question arose at that time as to whether an appeal could be taken from the judgment or whether the appeal should be taken from the judgment and decree fixing the plan, and your Honor asked Mr. Wright whether there were any cases where an appeal had been prosecuted prior to the adoption of a plan. Mr. Wright said, "I know of no case where there has been an appeal prosecuted prior to the adoption of a plan. In almost every case, the hearings on the plan occurred, and then a final judgment was entered embodying the final plan approved by the Court, and an appeal taken from the judgment as finally written with the plan set forth."

In other words, in almost every case the hearings on the plan occur before final judgment is entered. Now, the "hearings" must also involve the taking of facts if an attorney wants the Court to consider that in good faith. The facts taken on the trial show the situation as it existed up to 1942. The trial of the case was devoted to determining whether or not there was a violation of the Anti-Trust Law, and later your Honor is called upon to determine [fol. 5410] what should be done in the future. The facts of 1946 should be considered, particularly in an industry where practices have changed so much as they have in the

movie industry. You must have evidenec to determine what should be done. That is the purpose of my motion.

The Court: It seems to me that in the instance of many towns and cities the facts were gone over and the situation in reference to the operation of the theatres, the other theatres in the towns, population, and all those things, were certainly thoroughly established. I am not speaking of the single-theatre towns now, and there are perhaps other situations that were not covered. But I can see where a reference as to certain of these towns would be a duplication, going over, of the same subject matter considered on the trial.

Of course, we have had the plans previously submitted by you and the plan being heard now. The hearing on those plans would be an observance of the declaration of Mr. Wright in reference to holding a hearing after the plan is submitted. The Government has submitted a plan here, the defendant has submitted objections to it in great detail, and the defendant has submitted a plan, and you [fol. 5411] are today submitting a modification, another plan. Now, I don't know whether it is contemplated that you should go over this same ground.

Mr. Hays: I don't want to do it, your Honor. We haven't any time to waste here. But where does the record show, your Honor, the changes that have taken place in the situation of clearances?

The Court: Well, assume that today clearance has been wiped out entirely. That doesn't make any difference.

Mr. Hays: Well, it would make a difference in the situation in these various towns. If all the abuses that were found in this record here were wiped out in 1946, then your remedy wouldn't be nearly as drastic as if they still existed.

The Court: No. But assuming the law has been violated, I don't see how the fact that the situation was changed today, or a little earlier, affects the right of the Court to order re-organization or some change.

Mr. Hays: Well, your Honor has already granted injunctions that protect the Government and protect the public.

The Court: That is very true, but that is an entirely different situation.

Mr. Hays: Let me put it this way: When you restore com- [fol. 5412] petition in towns A, B, C and D by compelling

Schine to sell his theatres there, and state what the facts in each of those towns are, I would say that is restoring competition and not penalty, if your Honor so stated. Then I would have a question of law that I could raise to a higher court, whether your judgment is correct or not. But the Government doesn't make any statement. They submit a plan not based on this law. They base it on the statement that 70 per cent of the theatres owned by Schine must be sold, even if in 90 per cent of the 70 per cent there was no violation of law found. They don't care. They say we may not operate in two or more towns within 25 miles of each other. We say "Why 25 miles? Why not ten miles? Why not thirty miles?"

The whole business is arbitrary, and before anything like that is done I say the Court must have facts, and, before I can argue that the plan is arbitrary and unfair, I must have facts to base my argument on.

For instance, today I don't know—and I don't know whether your Honor knows or not—I don't know how many of the towns where they would like us to sell theatres are [fol. 5413] towns where there were any practices that were alleged to have been illegal and in violation of the Sherman Anti-Trust Law. I don't know whether your Honor knows. I don't believe there was any evidence of that in the record here.

The Court: Well, you can go through the record and point it out. That is true, in certain of these towns there is no evidence concerning them at all. It simply brings up the question of whether the Court can find there were elements of monopoly in the one-theatre towns and that competition was suppressed as a basis for the judgment eliminating them, without having something in the record to show it.

Mr. Hays: Then your Honor knows there were many towns here where the Government proposes to sell our theatres where there was no evidence in the record?

The Court: That is true.

Mr. Hays: On what basis do they present such a novel proposition?

The Court: Well, the basis, as I construe it is on the large basis that the Court has authority to reorganize the whole setup of the corporation.

Mr. Hays: Well, your Honor, so far as the record shows, and so far as your knowledge goes, the 30 per cent of [fol. 5414] our circuit that they are leaving to us might be

the 30 per cent of the theatres that are all losing money. In other words, you might be sending us to ruin, so far as you know. In other words, so far as you know, the Government may be saying "Well, all right. Sell all the good theatres; you keep the bad ones." Have we a right to show that to your Honor and prove that that might be the fact? And how about expert testimony? If the purpose here is to work out a plan to restore and maintain competition, certainly, these lawyers in Washington, new to the business, haven't as much knowledge to do it as men in the business.

They say blithely, "Sell this theatre. That will restore competition." Why? I don't know. There is no evidence in the record of what will restore competition. In other words, on this new problem that exists today, the evidence in the case is not at all conclusive. Not only that, but when I see the briefs on all sides, the briefs of the Government and the briefs of Mr. McKay and see that they are about split on questions of fact which are not questions of fact that were tried in the case, but are questions of fact upon the determination of which a proper plan has to be [fol. 5415] based, how is anybody going to argue before you as to whether these facts are right or wrong? As the Government says, they are assertions of counsel; as we say, they are assertions of Government counsel. Thank heavens, in this country we still stand on the same footing. But they are questions of fact. How are we going to resolve these issues, when every two briefs bearing on what happened since 1942 differ? How is your Honor going to determine who is right on these statements of fact? Or are you going to say, "I don't care. This is what he wants, so I am going to enter a decree without evidence?" How can you do it?

The Court: Statements of fact with reference to what particular things do you mean?

Mr. Hays: Clearances; franchises; the Consent Order of 1942.

The Court: Well, we did go over that before, that is, concerning those towns about which we have taken testimony. That is the point I make. If there is any merit to your motion, it seems to me it should be applicable only to those town concerning which there is no evidence. And that again brings up the question of whether the Court is justi-

fied in eliminating those towns where there is no evidence to show the conditions.

[fol. 5416] Mr. Hays: Now, your Honor, another thing I don't understand is that your opinion and judgment refer to re-organization or re-alignment or dissolution to restore competition. Well, isn't it necessary to have the facts to find out whether any judgment will restore competition?

The Court: Well, we must make our judgment on the evidence of the conditions in the certain localities. We must take each situation where we can say that restoration of competition can be got by the elimination of a single theatre in a large town based on all the facts. But I can't see what we gain by going back over that same ground again.

Mr. Hays: I don't, either, and I shouldn't take the time to do it if I felt the record contained the facts that I wanted.

The Court: Well, I had particular reference to many of these towns where you say you think facts should be shown and where sufficient evidence has already appeared as a basis for some plan or some arrangement whereby competition will be restored.

Mr. Hays: But the evidence, your Honor, taken in the record was not taken for that purpose, to throw light on what would restore competition, and the question today is what will restore competition.

[fol. 5417] The Court: In the Crescent case there was no such application made that I know of.

Mr. Hays: I am not sure. I think the judgment included the plan.

Mr. McKay: In the Crescent case, your Honor, the divestiture was embodied in the judgment. There was no need for further application of a plan, and it didn't require any further elucidation. If your Honor will bear with me, I think I have here what the judgment said in the Crescent case.

The Court: Well, I suppose the judgment in this case could have done the same thing. But, at least, I don't recall the defendants in that case requested the opportunity to take further proof.

Mr. Hays: Let me present this analogy to your Honor: Suppose a company files a petition under the Chandler Act, the old 77-B, and a re-organization is required.

The Court: Yes.

Mr. Hays: The fact is determined by the filing of the petition that they can't get along in business. But certainly the Courts hear evidence in connection with the formulation of a plan for re-organization. And what would you think about having thrust on you as a Judge the burden [fol. 5418] of reorganizing the company without hearing evidence as to the status of the company in the industry?

The Court: Well, you have begged the question there, as to the status in towns where evidence has been taken. We have taken evidence in many of these towns to show how competition has been eliminated, and in those particular towns I think the Court is in a position to say what change should be made in order to restore competition.

I am not going so far as to say that that applies to all the towns in this record, but I am speaking of the cases where there is evidence showing, as I pointed out before, the operations of the defendant. Assuming by his method he has forced two or three theatres out of business and in different ways has eliminated competition, in those cases where the evidence is all here, I can't see the sense of duplicating it.

Mr. Hays: Your Honor, where it is all here there is no sense, and I hope you realize that we, as lawyers, are observant of that. We are not trying to put in duplicate evidence. But in many cases that is not shown.

Let me say this: Suppose the company had sixty theatres, [fol. 5419] and then they acquired one more theatre, the sixty-first theatre, by forcing out a competitor, doing something illegal, and the Court found that they did. On what basis can the Government come in and say "We want you to sell 40 of your 60 theatres"?

The Court: Well, that is different. That is based on conspiracy.

Mr. Hays: I know, but you have a claim of conspiracy in the analogy I make. Is it possible to sell 40 theatres because a person is found wrong in the acquisition of one theatre?

The Court: Well, that wouldn't rise to the dignity of a conspiracy. This is a conspiracy between a group of corporations organized under a single head.

To go back to this town of Bath: There is nothing in the record shown about that, except that there is a theatre there, a single theatre owned by Schine. Supposing we opened

up the testimony. What would you want to show about Bath? I take that town by illustration because that is the first one named.

Mr. Hays: Well, your Honor, my difficulty is I am not familiar with these specific theatres. I have been in this case such a short time.

[fol. 5420] The Court: Well, what is your general idea of what you want to show?

Mr. Hays: Well, my general idea is to show it is a town of 5,000 people.

The Court: Yes.

Mr. Hays: And before Schine came there there was one theatre; that Schine came there; that there is still one theatre.

The Court: That he bought that theatre out?

Mr. Hays: That he bought that theatre out and there is still one theatre; that surrounding towns of the same character and population, 5,000, don't support more than one theatre; that in the vicinity there are perhaps fifteen towns with one motion picture theatre. Then I would say how would it bring about the restoration of competition, that the Court desires, to make Schine sell that theatre.

The Court: Well, that, of course, is based on the theory that competition had been eliminated. But the point with me is—and I am arguing, perhaps, along the line of your arguments—there is nothing to show about that here now whether it is a one-theatre town or whether it could support more than one theatre, is there?

[fol. 5421] Mr. Hays: Not that I know of. I know of nothing in the record as to many of these towns. I don't know about this specific town.

The Court: Well, then, the question is whether the Court, by and large, in the absence of any testimony as to competition or anything else, has the right to include that town in the whole plan of reorganization.

Mr. Hays: But even in your opinion your Honor stated in one of the discussions that the remedy of dissolution is a harsh one and that if the restoration of proper conditions could be brought about otherwise you didn't intend to resort to that harsh remedy. And the opinion of Judge Hand said, too, that if it could be accomplished in some other way, it would be a disservice to break up an organization by dissolution. I think perhaps your Honor would like to hear evidence on that point, just what we propose to do.

The Court: Well, I have pointed out here, perhaps as in the Crescent case where they re-organized different groups under the same corporations, you might say, separated, that on the face of it the question might arise whether you accomplish much by simply transferring the ownership from a [fol. 5422] father to a son, or a husband to his wife.

Mr. Hays: You wouldn't accomplish anything, your Honor, if it were not done in good faith and if it was a sham. I was a little prejudiced against it myself from the beginning, and then I thought it through, and I realized that competition comes through management and not through stock ownership, and then I realized also that a great many of our big corporations in preceding anti-trust cases have been divorced in management, but they issued new stock for the old to the same stockholders, and that was the way they were dissolved. Sometimes it took several years before they restored competition as it was intended to be restored, and yet ownership wasn't the problem that concerned the courts at all.

The Court: Of course, this plan doesn't prevent one party from holding any stock ownership in any other corporation.

Mr. Hays: Yes, it does, your Honor.

Mr. McKay: Plan 3, your Honor, has separate ownership of the three corporations.

The Court: Of all of the stock?

Mr. McKay: Plan 3, yes, that is, Chart 4. It provides that J. Meyer Schine will own all the stock of I; Louis [fol. 5423] Schine will own all the stock of II; and the wives will own all the stock of III and IV, so there is absolute divorcement of ownership. Chart 3, Plan 2, provides separate control without separate beneficial ownership; Chart 4, Plan 3, separate both ownership and control.

I would like, in this connection, your Honor, in line with what Mr. Hays has been saying as to the necessity of testimony to support our plan, to state that just a little over a week ago in Washington I had a talk with Mr. Wright, and I asked at that time if there was any possibility of our agreeing on a plan which would be short of requiring us to dispose of some theatres. Mr. Wright said no. Mr. Wright then added that if the Court approved our plan the Government would appeal from that order approving our plan.

Now, as Mr. Hays points out, we may be in the position of the respondent on this feature of the case, and if we

are able to persuade your Honor that this plan we are submitting is the kind of plan that should be adopted, we certainly want to be able before the Supreme Court to support your Honor's decision to show why this plan we are submitting is a good plan, why it will accomplish the [fol. 5424] purpose of the judgment.

This application isn't limited to showing what a foolish thing the plaintiff's plan is; we want to show how our plan is the proper plan, so that if we come to that phase we will be in a position of having the facts to support the plan.

The Court: Well, won't your answer be simply that the Government's plan is a divestiture?

Mr. McKay: We feel that that should be sufficient, but we are faced with the definite statement by Mr. Wright that there will be an appeal.

Mr. Hays: The evidence that I would want to show in that connection, your Honor, is the difference that our plan will make in buying power, where the film comes from, and so on.

The Court: Well, they would be independent corporations, but whether they would act together or not is another question. Your plan is to separate them by towns in New York and Ohio?

Mr. Hays: Your Honor, may I recall to you a statement you made in your opinion, "The consent decree, therefore, brings up the question of whether the harsh determination of dissolution as urged by the Government should be compelled, or whether some adjustment or re-organization can [fol. 5425] be agreed on or fixed by the Court which will, as definitely as possible, prevent future violations."

That is why I am a little surprised that your Honor should bring up the punitive side of this thing.

The Court: Well, I used that word not in the ordinary sense, not in the nature of a penalty by fine, but in the nature of a remedy to which the Government is entitled.

Mr. Hays: Well, my point is that if it is a remedy then it must be based on conditions today and on evidence as to what will maintain future competition.

The Court: Well, you say we can do that just by stopping any further violations of the Anti-trust Laws, and leaving the organization as it is?

Mr. Hays: That may be in some cases. But I would want evidence to show that.

The Court: Well, we would have no lawsuit then at all. Just put the defendants on probation for a while.

Mr. Hays: As a matter of fact, these changes in practices in the past few years have changed the whole character of the industry.

Now, Mr. Heilbron has been handing me notes. I wonder [fol. 5426] if your Honor would let him say what he has to say instead of putting it through me.

The Court: Surely.

Mr. Heilbron: The analogy that I wish to make is one showing the difference in approach: After a defendant in a criminal proceeding has already been convicted, you have a record that he has committed an assault, let us say, for example. And yet the Courts, when defendants come before them for sentence, universally say, "I want to hear counsel so that I may know what the man's present occupation is, what he is doing now, and so forth.

It is true that there is a volume of testimony here. However, every word of that testimony was directed toward what the Government says in its reply "We only put in testimony here to show violations."

The thing that I can't get away from is your Honor's own judgment, which speaks of the purpose, the limited purpose, for the re-alignment, and that limited purpose is to restore and maintain competition. There are facts which are necessary to be introduced to show whether or not that purpose can be accomplished by any of the plans submitted. [fol. 5427] Your Honor is perfectly right when you say we may not and should not simply repeat where a theatre is located when that is already in the record, but we believe it is necessary to show what the impact of present conditions in the industry is on that theatre.

For example, let us go back to Bath: There are experts in the industry whom we may call. If the Government wants to call counter-experts, it may do so. An expert may take the stand and say that the purchasing power of the defendants—that which the Government so glibly calls "Excessive cir-uit buying power" and—that the purchasing power of an exhibitor in a town like Bath—and you prove it by distributors and by people who know the industry—cannot be exercised by one, necessarily, who has a circuit, because surrounding Bath there are these other towns, and

various other circumstances. For instance, you would also show this—which is very important and is done in every industry—you would show a clocking, and you would take advantage of surveys available to show the number of theatre-goers from place to place——

The Court: Well, in Bath it seems to me it wouldn't be [fol. 5428] necessary to show the surrounding territory, the contiguity of towns on the outside, because there, in the absence of any proof whatsoever, the question is where the burden, if any, rests, whether the Court by reason of the fact that there is no such proof should exclude that town.

Mr. Heilbron: That is well phrased, your Honor, but we are at the point now where there are two plans before the Court, and the hesitancy of the defendants is brought about by this: If they remain silent then the Government says "We are free to take any inferences which you have left uncontested." As soon as we contest their allegations they state this—and Mr. Hays has referred to it, "You cannot supply facts by the assertion of counsel." And supposing your Honor agrees with us that we can, and then we go up on appeal and the Appellate Court says, "No, no, Mr. Hays, Mr. McKay. If you wanted to protect the rights of your client you should have gone before Judge Knight and insisted that you be permitted to supply those facts, not by assertion of counsel, but by calling your witnesses and putting those facts in the record. If you did not insist upon that, then you have been derelict in that respect. We can't [fol. 5429] consider it."

Furthermore, it is not only the plaintiff's plan that is in question here. The defendant has a plan, about which we claim it is a matter of right to show in every detail which the plaintiff has discussed that this defendants' plan covers the purpose and the letter and the intendment of the Court's judgment, and that that intendment was what your Honor said in his judgment, to restore and to maintain competition.

Now, to restore competition there must be facts to show what the condition was prior thereto. And we are not in disagreement as to the towns that weren't mentioned in the record, and I think probably we could get started on our way to take the testimony there.

The only reason that I am taking up more of your Honor's time—with which you have been very liberal so far—is because, as I see it, the focus of the testimony taken on the

trial, as the Government admits, and now emphasizes, was not on what would happen competitively in the future; it was an attempt to show that there had been a violation. And I say that you cannot look at a plan in that light, and with [fol. 5430] as little repetition as possible, and for the benefit of both sides, mostly the defendants', because they are presently under attack, there should now be given, under your Honor's direction, the right to take testimony to deal exclusively with the problem of what should go into the plan, without dragging into that plan the consideration of what the Government did or didn't show with respect to those violations.

The Court: Well, I will look over these papers. It seems to me at the moment that so far as your motion to take proof is concerned, we have gone all over the various theatres in the New York area, and the theatres in Ohio and some of the other areas. So I would say on first blush that so far as your proposal to take testimony is concerned, we have got the situation before us in many of these towns from which we would be able to determine whether the plan is a right one or not.

We have also here the question as to your proposed plan, and that is simply a separation of the circuit into three corporations.

Now, take one of these towns, say, in Kentucky, that is proposed to be put under the ownership of the wives: In [fol. 5431] instances where there—two or three theatres in one town, you wouldn't want to go into the question there of whether there should be an elimination? What you are proposing broadly is that you include Kentucky and Maryland in one corporation. You don't propose to offer proof to show that in any of those towns you are justified in continuing your *modus operandi* there now, do you?

Mr. McKay: What we think about that, your Honor, if your Honor accepts our suggestion, we feel that we owe a duty to your Honor to support your Honor's decision before the higher court. Now, we in support of our suggestion would not have to offer the same detailed sort of testimony that we offer in opposition to the plaintiff's suggested plan. Our testimony in support of our plan would be confined more to demonstrating to your Honor the very small buying power that these separate corporations would have.

The Court: Well, take one corporation, for instance, New York: What do you want to show there? We have the evidence as to the theatres there, we know what they are.

Mr. McKay: We would like to show your Honor what has happened to the buying power since we have been buy-[fol. 5432] ing for open and closed towns separately as we agreed to do in 1942. We would like to show that since that time there has not been a single complaint that anybody was being deprived of product.

The Court: That is under the present organization or in this plan?

Mr. McKay: The plan would separate the New York theatres.

The Court: Well, we have the whole picture here. You wouldn't propose, after the testimony is taken, to have the Court finally cut out some of those theatres?

Mr. McKay: Absolutely not. Under no circumstances.

The Court: Well, I will look over these papers.

Mr. Heilbron: May I interrupt just a moment? This is still in answer to what your Honor asked Mr. McKay about the overall considerations here: The question of clearances would still present itself under the defendants' present proposed re-alignment, without any further proof in the record.

The Court: But what effect would that have on the plan?

Mr. Heilbron: Well, in the absence of proof, your Honor, it might have a great deal of effect. Where a plan is presented the proponent should have the right not only to show [fol. 5433] that the particular plan solves the problems which appear on the face, but also the lack of necessity of solving others. Now, Mr. Antevil sent me down from Gloversville a statement, and I was really amazed to see it.

The plaintiff stated that this question of clearances has not been one of arbitration. I find that in a number of cases Schine has been the complainant. Now, that is not in the record.

The Court: But in my mind, you have got a plan for the inclusion of all these theatres. Are we going to consider on the question of whether this plan should be approved where there has been or where there is not a conspiracy to effect unnecessary clearances and then say that that town should be taken out of this plan? You have submitted a plan here that comprehends the retention of all these theatres in New York, that is all there is to it.

Mr. Heilbron: No. Your Honor might say all right, but the Court on appeal might say "That is fine. You have cut down your buying power, but Judge Knight in his opinion said, 'One of the most troublesome questions in this case is that of clearances'. What have you put into the record as to the situation on clearances as it presently [fol. 5434] exists?" And we will have to say we didn't put anything in.

The Court: Well, supposing we find that there is a town where today you are exercising clearances unjustly and improperly. Would you cut that town out of the circuit under your proposed plan?

Mr. Heilbron: Well, we would rather find that out now than have the Government say that there is that particular town, without our even having a chance to show all the factors and take up all the questions to which your Honor referred. For instances, as to franchises: We shouldn't leave it to guesswork, if this goes on appeal, to have the Government say this plan does not eliminate the opportunity of the defendants to get franchises. We want to show what the present condition is as to admission practices, bank night, Bingo, and china give-aways. There is nothing in the record on any of those questions except the statements of counsel.

The Court: Well, it would be a re-trial of the issues as of today, by and large. That is what it would amount to.

Mr. Heilbron: No. It would just be supplementing with respect to a plan.

The Court: Well, what I mean is this: The plan propos- [fol. 5435] ing these things in detail speaks for itself, you might say. Here is a plan by which the groups are concentrated into three different organizations, and if under that plan certain orders in relation to clearances, and so forth, are carried out, well, that is sufficient rather than going to the extent of taking evidence all over again as to conditions as they exist today in distinction from conditions at the time of this trial. I certainly don't think any plan ought to require going to that extent.

Mr. Hays: May I make a suggestion, your Honor? Suppose you permit us to take testimony and provide in your order that we should not duplicate testimony that has already been taken?

The Court: Well, that would be pretty hard to follow.

Mr. Hays: That is right, but we would do our best.

The Court: The only way to eliminate duplication at all, it seems to me, would be to take testimony, if any, only as to towns concerning which there has been no evidence given as to conditions.

Mr. Hays: Suppose your Honor presently made that order, that we could take testimony as to those towns, without prejudice to our later making a further application. [fol. 5436] And you could determine later whether we should go any further.

The Court: Well, I am not deciding one way or the other. I am simply making the statement as a matter of argument. But I don't think it is material if you state today that you won't engage in clearances hereafter.

Mr. Heilbron: Well, may I point out that your Honor said we shouldn't take testimony as to towns that haven't been already considered? I say that you have to, because in each one of those town-, if you go back to the plaintiff's reply, they argue questions of clearance that date back to 1935, which are outdated, and even though this is in connection with a plan for the future. I say that you cannot fairly consider a plan if clearance is the thing to be emphasized, without considering what the clearance situation is in every town, and you can't take the record as it was taken at the trial because it is outmoded. I have gone over the analysis of the testimony and I find any number of clearance situations that were proved as of 1935 and 1936.

The Court: Well, of course, that again begs the question. You may today strictly be observing the provisions of the [fol. 5437] law in all respects as to clearances, cumulative buying, and things of that kind. But the Court has found the fact to exist that there has been a conspiracy here and has made some directions in regard to it.

Mr. Heilbron: But as your Honor said in the judgment, the purpose of the plan is to restore and maintain competition.

The Court: That is true.

Mr. Heilbron: Well, you can't say that a plan will restore competition merely because you have shown violations bearing on 1930 facts.

The Court: Well, there is no question in those towns where there has evidence been given to show that competition has been eliminated. The divide is on the question of

where we start, whether now at this time we should take testimony as to present conditions as bearing upon the question of competition.

Mr. Heilbron: Only where there has been a change, and that is so because if there has been no change we can't offer any additional testimony. We don't gain anything by duplication.

The Court: Only where there has been a change in what, you mean?

Mr. Heilbron: Change in the conditions. We don't gain [fol. 5438] anything by duplication. But after all, if the Court is after the truth, that truth must speak as of today, if you are looking at competition.

The Court: Well, in certain towns if you have sold two theatres since the judgment or since the trial of this case, then, of course, a changed condition might exist.

Mr. Heilbron: Then is that the only circumstance under which a changed condition might exist? Why, a town may have become a war town since that time, and its population and whole trend may have gone up to a three-theatre town instead of a one-theatre town. I think that we should have an opportunity in every town to show and get into the record whatever changes there may be as to clearance, population, adjoining territory, anything else.

Mr. Hays: I have just looked at the plan of the plaintiff. It provides that we sell all theatres in seventeen towns, without regard to whether or not there have been any changes in them.

The Court: Well, I have looked at the plan.

Mr. McKay: Your Honor, I am handing up a memorandum that is in page proof form. It will be completed to-[fol. 5439] morrow. I particularly ask you to consider the jurisdictional statement as it relates to the function of the Court at this time, the appeal having been allowed and citation issued, as to whether the Court is not now necessarily required to await the return of the mandate from the Supreme Court before approving any plan.

The Court: But you aren't going to suggest any unnecessary delay?

Mr. McKay: We are not suggesting any unnecessary delay. That is why we are here urging this motion on your Honor.

The Court: Well, it seems to me you are urging it even though you say I have no right to consider it.

Mr. McKay: If the Court will permit us to take testimony we will proceed with the taking of testimony, so that upon the return of the mandate there will be a plan ready as to which there will be complete evidence.

The Court: If you are right in your position that we can't take any testimony in reference to the plan now, then our time is ill spent here.

Mr. McKay: Well, we made our position very clear at the very outset.

The Court: The point is if you have to await the position [fol. 5440] of the Court on the judgment as entered, of course, we lose all of our time here.

Mr. McKay: Well, we were hopeful that your Honor would permit us to start the taking of testimony.

The Court: Well, I don't know. The Supreme Court might take that view later on.

Mr. McKay: Well, we don't want to let the point pass without directing your Honor's attention to it. It is a serious matter for us. This is only a lawsuit to the plaintiff, but it is a very serious matter to us.

Mr. Heilbron: I would like to ask leave to submit a supplemental affidavit by Mr. Hays and also a memorandum of law and argument in support of the motion.

[fol. 5441] IN THE DISTRICT COURT OF THE UNITED STATES

DEFENDANTS' PROPOSALS REGARDING REALIGNMENT OF SCHINE CIRCUIT

At the conference with the Court in Chambers on May 8, 1946, the defendants informally disclosed to the Court two tentative plans of possible realignment of the Schine Circuit, and the defendants promised that at the next hearing they would endeavor to elaborate and improve upon these plans. Without withdrawing either Plan 1 or Plan 2, the defendants now submit on Chart IV a further plan, designated Plan 3.

In submitting these plans, the defendants reserve all objections which they have heretofore made with regard to the formulation, adoption or approval at this time or at any time prior to the determination of the appeal in this case by the Supreme Court, of any plan for the dissolution, reorganization or realignment of the Circuit.

The defendants' position on this point is set forth at length in the memorandum submitted herewith, and although [fol. 5442] not repeated here is incorporated at length herein by reference. Anything that we may say *infra* regarding possible realignments or regarding the possibility of curing alleged abuses, or the possible willingness of the defendants to agree to certain conditions under which they would continue to do business, is subject and subordinate to that basic position and subject to the consent of the defendants and each of them to a complete solution of the entire problem which will not involve any conditions other than those hereinafter discussed and which specifically would not involve the sale or other disposition of any theatres.

In connection with our submission of this proposal, we point out to the Court that in the plaintiff's reply to our objections, there is no criticism, constructive or otherwise of the suggestions advanced by us on pages 111 to 124 of the objections, and that in the "plaintiff's comments on defendants' plan", the principle criticism is that the plan is too simple, and the only suggestion is that the Court should not hold the hearing now fixed for May 28, 1946, to which the plaintiff's representative agreed at the time the date was fixed.

We submit herewith four charts.

Chart I, shows the present alignment of the Schine Circuit.

Chart II shows one proposed realignment, designated "Plan 1".

Chart III, shows a proposed realignment designated "Plan 2".

Chart IV shows a proposed realignment designated "Plan 3".

[fol. 5443] In considering these plans, and particularly with reference to Plan 3, we direct the attention of the Court to the following feature which has not heretofore appeared in this case. Under Plan 3, the ownership, operation and management of the New York theatres is wholly separated from the ownership management or operation of theatres in any other state. This presents an entirely different aspect of the applicability of the Sherman Act to the operation of motion picture theatres from any heretofore presented in any antitrust case which we have been able to find.

In holding that the motion picture business is interstate commerce, and therefore, subject to the Sherman Act, the Courts have universally relied upon the case of *Binderup* v. *Pathe Exchange, Inc.*, 263 U. S. 291. In the matter of *United Artists* v. *Taylor*, 273 N. Y. 334, the Court of Appeals was called upon to decide whether a transaction between a distributor located within the State of New York and a theatre also located in the State of New York constituted interstate commerce. The Court clearly distinguished such a situation from the situation which in the *Binderup* case, the Supreme Court had ruled to be interstate commerce, saying at page 339:

> "Probably by the sale to this appellant in this State by the producer in California of films manufactured in that State and elsewhere outside New York, and their transportation to this State is included within the operation of interstate commerce. (Binderup v. Pathe Exchange, Inc., 263 U. S. 291.) After those positive and negative prints have reached New York they have come to rest here. No longer do they continue a part of interstate commerce any more than oranges grown in [fol. 5444] Florida, automobiles built in Michigan, or textiles spun in Massachusetts. A new intra-state transaction occurs when this appellant, as distributor in New York, who has acquired the right to possession of the films and the license to transfer possession of them for purposes of exhibition in this State, makes contracts in this State for marketing them here. The facts herein differ materially in principle from those in Binderup v. Pathe Exchange, Inc., (supra), upon which appellant places strong reliance. There the distributors in New York contracted with the exhibitor in Nebraska and delivered in Nebraska. In this case, as far as the Appellate Division has held the transaction taxable, the distributor in New York city contracts with the exhibitor in New York city for delivery in New York City. In so far as this appellant deals with exhibitors in New Jersey and other States, that phase of the case is governed by the Binderup case."

It will be noted that in making this distinction, the Court of Appeals was not influenced in any way by the fact that this case involved taxation. What it decided was that when a distributor in New York State makes a contract with a

theatre in New York State under which the distributor licenses the exhibition by an exhibitor of a motion picture in New York State, and delivers the print in New York State, the transaction is intra state.

Following this reasoning, it conclusively appears that the operation of New York State theatres by the New York corporation provided for either in Plan 1, Plan 2 or Plan 3, including the contractual arrangements under which these theatres obtain prints from the distributors does not in any way constitute interstate commerce and does not affect interstate commerce, the operation of said theatres having [fol. 5445] been completely separated from the operation of theatres without the state. Under Plans 1 and 2, the management and control is separated, although there is common beneficial ownership of extra-state theatres, but in Plan 3, even the ownership is separated. The only possible basis for the inclusion of the New York theatres in this litigation in the first instance had to be that the operation of the New York theatres in conjunction with the operation of theatres outside of the state, resulted in the use of the buying power of the New York theatres to affect transactions relating to theatres outside of the state, and thereby effecting interstate commerce. This has been completely eliminated by the proposed realignment.

We are confident that there is no decision in any reported motion picture case in conflict with the above position, and we submit that the motion picture industry is such a unique industry that no analagous case can be found.*

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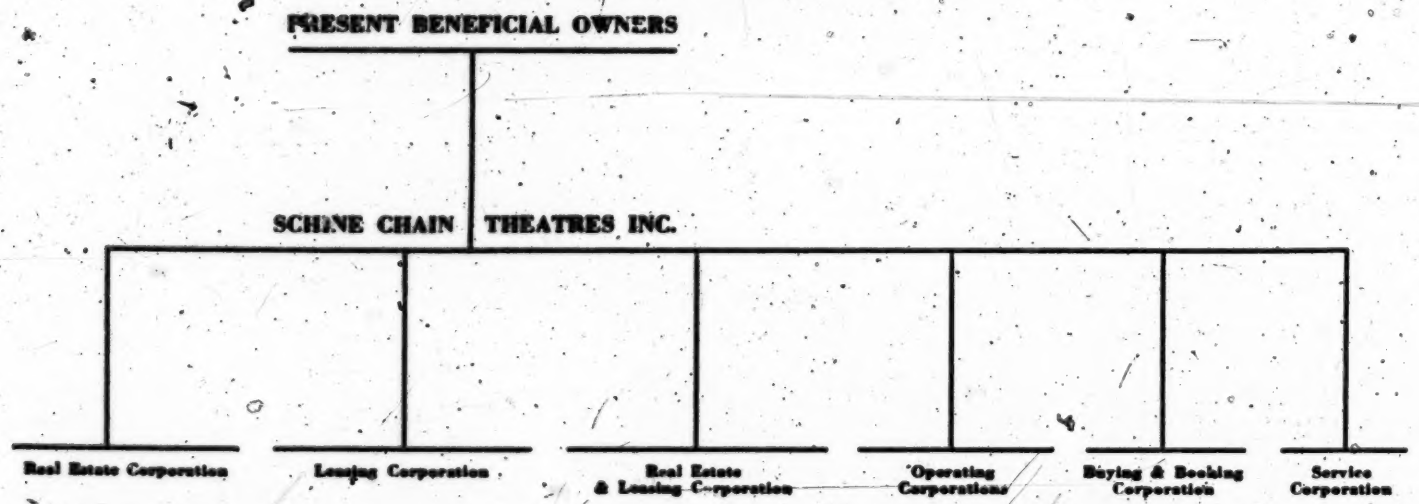
* The opinion of Mr. Justice Botein in the New York State Supreme Court, Special Term, New York County, in the case of *Leader Theatre Corporation* v. *Rand Force Amusement Corporation, et al.*, (which opinion we believe to be unreported), and the cases of *J. J. Theatres, Inc.* v. *Twentieth Century-Fox Film Corporation*, 265 App. Div. 994, and *Peekskill Theatre, Inc.* v. *Advance Theatrical Co.*, 206 App. Div., 138, although dealing with the Donnelley Act do not pass squarely upon this point.

[fol. 5446]

CHART I

SCHINE CIRCUIT—PRESENT ALIGNMENT

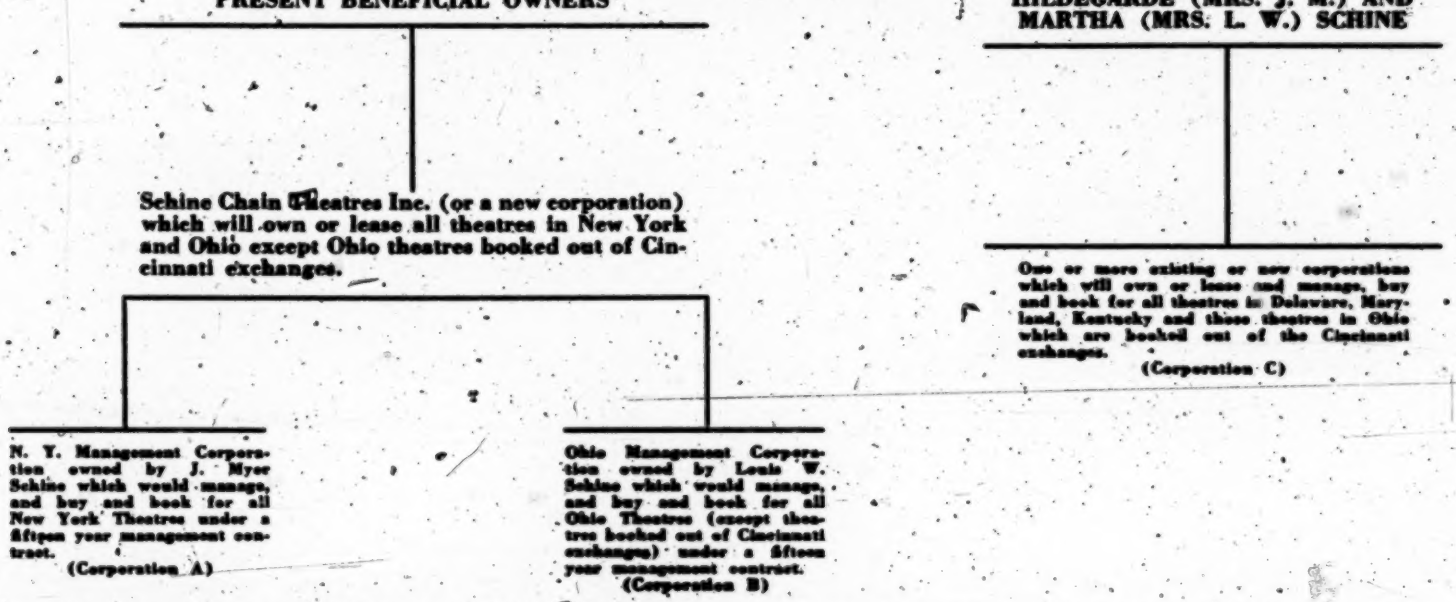


1. The present beneficial owners are J. Myer Schine and Louis W. Schine. John A. May has no legal or beneficial ownership, either directly or indirectly.
2. All of the corporate defendants are included in one or more of the above categories.
3. In some cases a subsidiary is both a leasing and operating corporation or a real estate and operating corporation. In some cases a corporation may both own and lease theatres.

[fol. 5447]

CHART II

SCHINE CIRCUIT—PROPOSED REALIGNMENT (PLAN 1)



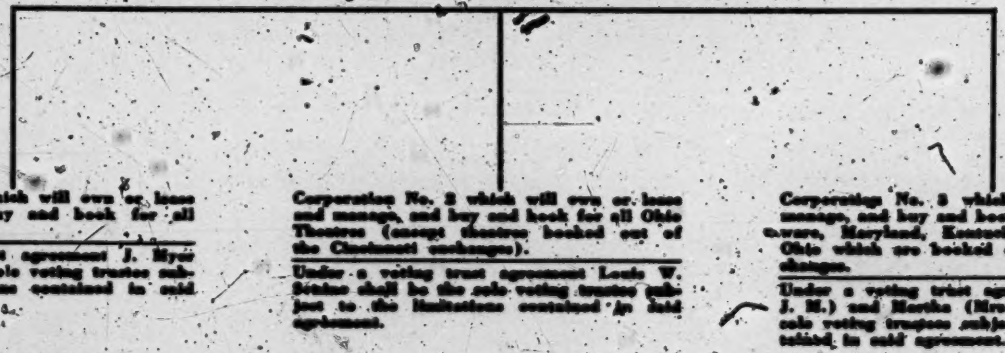
1. No officer, director or stockholder of Schine Chain Theatres Inc., or of Corporations A or B may, at any time, be an officer, director or stockholder of Corporation C.
2. No officer, director or stockholder of Corporation A may, at any time, be an officer, director or stockholder of Corporation B.

[fol. 5448]

CHART III

SCHINE CIRCUIT—PROPOSED REALIGNMENT (PLAN 2)

PRESENT BENEFICIAL OWNERS

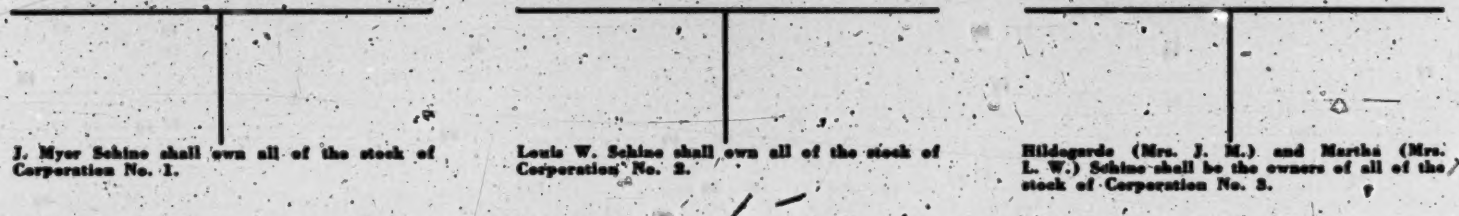


1. No officer, director or voting trustee of Corporation 1 may at any time be an officer, director or voting trustee of Corporation 2 or 3.
2. No officer, director, or voting trustee of Corporation 2 may at any time be an officer, director or voting trustee of Corporation 1 or 3.
3. No officer, director, or voting trustee of Corporation 3 may at any time be an officer, director or voting trustee of Corporation 1 or 2.
4. With respect to Corporation 3 it may be necessary to have two or more corporations but for the purposes of this plan they shall be treated as a unit.
5. The terms of the voting trust agreements provided for above are to be subject to the approval of the Court, so as to assure independent management of each corporation, by the sole voting trustee or trustees. The voting trust agreements shall be for a term of ten years, subject to renewal at the discretion of the Court.

[fol. 5449]

CHART IV

SCHINE CIRCUIT—PROPOSED REALIGNMENT (PLAN 3)



1. No officer, director or stockholder of Corporation 1 may at any time be an officer, director or stockholder of Corporation 2 or 3.
2. No officer, director, or stockholder of Corporation 2 may at any time be an officer, director or stockholder of Corporation 1 or 3.
3. No officer, director, or stockholder of Corporation 3 may at any time be an officer, director or stockholder of Corporation 1 or 2.
4. With respect to Corporation 3 it may be necessary to have two or more corporations but for the purposes of this plan they shall be treated as a unit.

[fol. 5450] As part of either Plan 1, Plan 2 or Plan 3, the defendants suggest the following additional provisions:

1. Wherever, the interest presently owned by the defendants in any theatre is less than one hundred percent, such interest shall be included with the one hundred percent owned theatres in the area in which such partially owned theatre is located.

2. The injunctive provisions of the present judgment shall be binding upon the new corporations, provided for under either Plan 1, Plan 2 or Plan 3, except that there shall be no injunction against the acquisition or sale of theatres, the necessity for such injunction having been eliminated by the adoption of either plan.

Obviously there is no need for any injunctive provision against the sale of theatres. No such injunction was prayed for in the complaint, and what the plaintiff has been seeking to accomplish is exactly the opposite. With respect to the acquisition of theatres in the future, we submit that after either of these plans go into effect, there is no compelling reason for an injunction against the acquisition of additional theatres, except that possibly the Court might feel it advisable to prohibit the acquisition by one corporation of any theatre in the territory in which one of the other corporations was operating.

3. Corporations A, B, and C in the case of Plan 1, or corporations 1, 2 and 3, in the case of Plan 2 or Plan 3 shall maintain separate office facilities for the conduct of their respective business operations.

4. Each corporation shall license the motion pictures used by such corporation separately.

[fol. 5451] 5. The defendants shall have at least two years in which to put into operation the realignment suggested.

It will take two years to put a plan of realignment into operation, because there are numerous problems involved in connection with arriving at a fair valuation of the various properties, as between the present owners and the new owners, and there are also problems involved in connection with obtaining necessary consents and other authorizations required for the transfer of some of the properties. There are also serious personnel problems arising out of the necessity of organizing new competent management staffs. More

importantly, there are extensive financial arrangements which will have to be made between the individuals arising out of separate instead of combined ownership. Since all of the earnings of the enterprise have been plowed back into the enterprise itself, the individual beneficial owners have no extensive independent financial resources aside from their ownership of the enterprise itself. The Court will recall that at the hearing of April 16, 1946, when the undersigned directed attention to the length of time which it had taken to put into operation the decree in the *Crescent* case (the decree in the *Crescent* case was handed down in March, 1943, the affirmance by the Supreme Court was in October, 1944, and no realignment has as yet been accomplished, the plaintiff having expressly consented to the last postponement which expires in July) counsel for the plaintiff stated that this was because of the fact that the various individuals involved had to make financial arrangements in order to arrange for the separation of their interests and the Court accepted this explanation as entirely logical.

6. There shall be included the following suggested remedies, discussed in the "defendants' objections to plaintiff's [fol. 5452] so-called plan of reorganization", filed on April 1, 1946, none of which were criticized or objected to in any way in the plaintiff's reply brief, or in the "Comments on Defendants' Plan", to wit: *

A

Alleged Excessive Circuit Buying Power

Schine will agree to continue the segregation of film-buying as between "open" and "closed" towns provided for by the Consent Order of May 19, 1942.

This alleged abuse is the one upon which the Court seems to have placed the greatest emphasis. The Court attributes this buying power to the fact that the Schine Circuit is claimed to have combined "open" and "closed" towns in its dealings with the distributors. The Opinion also states that Schine was accustomed to buying product

* The following suggested remedies are paraphrased and summarized from pages 112 to 124 inclusive of our objections, filed April 1, 1946, but are repeated here for the convenience of Court and Counsel.

for theatres not owned or occupied by it. This, the Court says, brought about and increased the ability of Schine to dictate terms to the distributors.

Of course, the above alleged abuses, and all other abuses mentioned in the Opinion and in the Findings of Fact occurred if at all prior to May 19, 1942. No violation of the Act since that date has been claimed or could be proved. Any abuse which may have resulted from combining "open" and "closed" towns, in making deals with distributors, was eliminated by the provisions of the Consent Order of May 19, 1942, under which the Schine Circuit agreed to buy separately for its "open" towns and its "closed" towns. (See our brief dated February 25, 1946, pp. 21-22.)

[fol. 5453] With respect to the authority of Schine to buy and book for theatres not owned or operated by it, we have already pointed out that all of Schine's existing booking contracts at the present time are made with theatres in which it has a financial interest, with the exception of the summer theatre at Sacandaigua Park, New York, and that the same observation applies to all contracts in force at the time of the commencement of this litigation. (There was a contract with the Big Stone Theatre, Big Stone Gap, Virginia, running from May, 1940 to February, 1941. Schine had no financial interest in this theatre except an option to purchase a one-half interest. It received a total compensation of $208.36 for its services under the contract and the theatre owner defaulted in performance thereof.) It is, therefore, not a correct statement to say that Schine's buying power has been increased because it buys for theatres in which it has no financial interest.

Irrespective of the extent of the buying power of the Circuit, there is no evidence in the case to show that this buying power was used to purchase pictures which were not needed by the Circuit for exhibition in theatres operated by it, or to purchase pictures at prices lower than those which a competing theatre was willing to pay. Therefore, the fact that in certain instances when Schine had a contract for product, a competing exhibitor was unable to obtain the same product for the same run, cannot, standing alone, be cited as a violation of the Sherman Act.

The segregation of buying power as between "open" and "closed" towns, as provided by the Consent Order was entirely satisfactory from May, 1942 to May, 1944, and should be a satisfactory solution now. The buying power

of these theatres has been further decentralized under each [fol. 5454] of the plans of realignment by dividing up the theatres as indicated in the plans.

With respect to this segregation of buying power, Mr. Wright in presenting the Consent Order of May, 1942, to the Court, stated at page 6 of the transcript of that date:

> 'Mr. Wright: I think it goes further than the consent decree in the other case. One of the allegations in the complaint here, if your Honor recalls, is that the——
>
> The Court: The combination.
>
> Mr. Wright: Yes. In substance this prevents the Schine Circuit from combining its closed towns with these competitive situations in making film licenses.'

B

Clearance

Schine will agree to arbitration of all disputes regarding Clearance.

This alleged abuse seems to be the second in importance in the Opinion of the Court and in the Findings.

As we have already pointed out in our brief, dated February 25, 1946 (pp. 13-15, 19 and 26, 27 and 28), there is no evidence in this case that any of the clearances referred to in the Opinion and Findings were in fact unreasonable. An analysis of some of the clearances, to which reference is made, would show that they meant absolutely nothing.

In any event there is now in existence machinery especially designed and effectively operating to handle all disputes regarding clearance. We refer to the arbitral system set up under the Consent Decree in the Southern District of New York and supervised by the American Arbitration [fol. 5455] Association. Reference to this system is made on pp. 26 and 27 of our brief, dated February 25, 1946.

In submitting the arbitration provisions of the Consent Decree to the Court in the *Paramount* case, Assistant Attorney General Hayes, representing the *United States*, said:

> "And I may say in that connection that it has long been felt, both by exhibitors and by distributors, that there is no fairer way to handle and dispose of complaints concerning clearance then to have the clearance fixed by some impartial arbitrator, and that is precisely what is accomplished by Section VIII. • • • Those

of us who have worked on this decree after reviewing, as I said at the very beginning, the numerous industry problems in all their ramifications with the government representatives keeping constantly before their eyes, as was their duty, the complaints of exhibitors and the complaints of public groups, are of the opinion that the decree is a desirable forward step. We believe it will work. We believe it will produce good. We recommend the decree to your Honor."

As a practical matter, since the institution of this system, the Schine Circuit has voluntarily participated in the arbitration proceedings in every case where one of its theatres was involved.* A formal consent by Schine to continue this practice in the future would furnish an effective and expeditious manner of disposing of all clearance disputes in which any of the Schine theatres might be involved.

[fol. 5456] In order to anticipate any objection on the part of the plaintiff that only the so-called Big Five are bound by arbitration proceedings under the Paramount Decree the Schine Circuit will agree (subject to the reservations herein set forth) that any clearance fixed by the arbitrators in any proceeding involving Schine and any one or more of the Big Five shall be the clearance to prevail on all contracts affecting the situation under arbitration, irrespective of the distributor. If this is not satisfactory, the Schine Circuit will agree to arbitrate clearances, not covered by the arbitration system under the *Paramount* decree, under the Rules of the American Arbitration Association.

It appears that numerically more instances of claimed unfair clearance are mentioned in the opinion and findings than any other single alleged abuse. It is submitted that the above suggestion furnishes a convenient, expeditious and impartial forum for the correction of any and all abuses in relation to clearance.

The plaintiff may now argue, reversing the position previously taken by it with respect to clearance, as indicated by the quotation from Mr. Hayes at page 11 *supra*, that

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* The records of the defendants to indicate that since May 19, 1942 they have participated in 16 arbitrations under this system, in 9 of which they have been respondents and in 7 of which they have sought relief from alleged excessive clearance granted other exhibitors over Schine Theatres.

clearance *per se*, is illegal. In fact, in the course of the final arguments in *U. S.* v. *Paramount, et al.*, Mr. Wright stated point blank in answer to direct questions asked by Judges Hand and Bright, that although at one time he had not thought that there should not be any clearance provisions at all by anybody, he now does so think and desires to scrap the Consent Decree completely insofar as it purports to arbitrate the clearance.* If the plaintiff should be successful [fol. 5457] in establishing this proposition, there would be no need to consider clearance remedies at all as far as Schine is concerned, because clearance would not exist.

C

Franchises

Schine has no franchises now and subject to the reservation hereinafter set forth will not enter into any in the future.

The Court attributed a considerable part of the advantage which it found that Schine had over so-called independents to the fact that Schine was in the habit of making franchises (i.e., film contracts covering a period of more than one year) with the various distributors.

Although much has been said in the Opinion and in the Findings to the effect that Schine was able to obtain "concessions not obtainable by independents" because of the existence of these franchises, there does not appear in the record a single instance where a so-called exhibitor was unable to obtain the same provisions in his contract as were to be found in the Schine contracts *if he had asked for the inclusion of these provisions.* Nor does there appear in the record any instance where an exhibitor—a so-called independent—was unable to make a franchise agreement with a distributor for any product that was open for his theatre, if he so desired. The record shows that in making franchise agreements no distinction is made between large circuits and independent exhibitors operating only a few theatres and more franchises have been issued to the latter than to the former (T. 2468, Exs. 741 to 744; T. 1166, 4457, 4488, 4614, Exs. D-47, D-48, D-123 to 129; T. 1170). Any failure

*(See p. 2572 "Arguments", *U. S.* v. *Paramount, et al.*, previously furnished the Court. Note also Judge Hand's comment at p. 2702.)

[fol. 5458] on the part of a so-called independent to license motion pictures under franchises, or to obtain in his film contracts provisions similar to those found in the Schine contracts, was due not to his inability or to superior circuit buying power on the part of Schine, but to his own ignorance, or indifference.

Irrespective of the foregoing, all of the franchises held by the Schine Circuit were voided by the Consent Order of May 19, 1942 and, subject to the above stated reservations, it would be possible to provide that no franchises shall be made in the future. Any such provision would, of course, have to be subject to a further provision that if licensing by franchise again became prevalent in the industry, then the Schine Circuit would be permitted again to license films under franchises to the same extent as other exhibitors.

D

Other Alleged Abuses

The Opinion and Findings and Conclusions mention other alleged abuses, but these do not appear either prevalent or important, if the suggestions made above are adopted.

1. Presumably it will be conceded that business stimulants, such as Bank Nights, Bingo, Two-for-One, China Give Aways, etc., were wholly the result of the depression starting in the early 1930s, and have now almost entirely disappeared. Certainly they do not exist to such extent as to constitute them unfair competitive practices.

2. Changes in admission prices are almost entirely seasonal, or the result of unusual conditions in a particular locality. It is natural for a distributor, who has had a long [fol. 5459] period of experience with a particular exhibitor (whether the owner of a single theatre or a large circuit), whom he has found to be a capable theatre operator, to leave to the judgment of that exhibitor the question of admission prices. No instance has been shown in this case where any one was harmed by changes in admission prices made by Schine and, in any event, a very mild injunctive provision would be all that is required to eliminate this possibility *in toto*.

Furthermore, although until the submission of its brief in reply to our objections, the government always contended that the admission prices charged by Schine in certain towns

were too low, the government now claims that Schine overcharged its customers (plaintiff's reply brief, page 12).

3. The Court has included in the Judgment a provision against so-called non-competitive agreements. A number of these agreements were physically introduced in evidence, but no attempt was made to analyze the same, or any of them, nor was any evidence introduced indicating that they had in any way operated to restrain competition. The obvious purpose of these agreements was to protect the good will which the Schine Circuit was buying in connection with its purchase of the land and buildings in which a certain motion picture enterprise was being operated. Such an agreement, properly limited as to scope, has always been upheld by the courts as entirely legal and proper. If, in any instance, the defendants have overstepped the bounds, this should be pointed out to them so that in the future the scope of the agreements will be properly limited. We are certain that the Court did not intend absolutely to forbid the making of any such agreements at all.

[fol. 5460] Conclusion

As we have already stated, the plaintiff did not criticize any of these suggestions either in its reply brief or in its "comments". Nor did the plaintiffs make any suggestion as to the possibility of improving upon any of them, a fact which, we submit, justifies us in assuming that their incorporation in either Plan 1, Plan 2 or Plan 3 will result in a satisfactory solution of the problem before this Court, without invoking a remedy which the Court has already criticized as "harsh" and which Assistant Attorney General Hayes, when speaking only of divorcement of exhibition from distribution, a much milder remedy, characterized as "chaos" (Arguments, p. 2715).

* * * * * * * *

Either of the Plans submitted herewith will bring about three separate management units, each with a very limited buying power. There are today many independent theatre circuits all over the United States, not subject to government attack, with much greater buying power than any one of the units suggested under the three Plans.

* * * * * * * *

The separation of beneficial ownership provided for under Plan 3 takes care of the question of inter-family control, which the Court mentioned at the discussion in Chambers on May 8th. Plan 3 is entirely consistent with the realignment provided for in the *Crescent* case and approved by the Supreme Court. In the *Crescent* case the Court was not at all concerned by the fact that the separate units provided for by the decree would be owned in whole or in part by an individual, the wife of the individual and the son-in-law of the individual. If the Court, upon fur-
[fols. 5461-5462] ther study, should still feel that there may be "aggravated situations" as suggested during the course of the discussion on May 8th, this question can be cleared up by the taking of testimony with respect to those situations as prayed for in defendants' motion to be presented concurrently herewith.

Respectfully submitted subject to the above reservations,
Willard S. McKay, Attorney for the Defendants.
Arthur Garfield Hays, Howard M. Antevil, of Counsel.

[fol. 5463] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

DEFENDANTS' MEMORANDUM OF MAY 28, 1946

As a part of this memorandum we are resubmitting bodily "Reply Brief for Defendants", dated May 7, 1946. We are also including a concise chronological statement of the defendants position regarding the jurisdictional situation in this case, as it has developed since the opinion was handed down, together with what we hope will be a final statement regarding the Consent Order of May 19, 1942.

We are also dealing briefly with other matters touched upon in the "Plaintiff's Comments on Defendants' Plan", served since service of our reply brief. Defendants are also submitting concurrently herewith their proposals regarding possible realignment of the Schine Circuit, which were tentatively presented to the Court on May 8, 1946, and also offered to plaintiff's counsel for the sole purpose of studying the same and commenting thereon. In these proposals we have concientiously endeavored to meet the suggestion made by the Court regarding inter-family control of the

[fol. 5464] separate corporations. Since the plaintiff has offered no constructive criticism of our tentative proposals, either as to the machinery set up or the suggestions previously embodied in our objections to the plaintiff's plan, except the assertion that our plan of realignment is too simple and should have been submitted long ago, we have addressed ourselves only to the suggestions of the Court.

We have not dealt in this memorandum with our motion for the taking of testimony, which is to be presented concurrently herewith, and which is covered in separate affidavits and memoranda.

I

The Jurisdictional Situation

The opinion in this case was handed down on October 8, 1945 and the Court suggested that new findings be submitted by counsel in the light of the opinion. In its haste to obtain the entry of a judgment, the plaintiff did not prepare any new findings but simply split up the factual parts of the opinion into numbered findings of fact and sent these along together with new proposed conclusions of law and a proposed judgment. Counsel urged the Court that the judgment be entered immediately and stated that any questions which the defendants desired to raise could be raised under Rule 52B. The Court adopted this suggestion and refused the request of defendants' counsel, who had been ill, for ten days in which to complete new proposed findings. So hasty was the plaintiff in procuring the entry of a judgment that it even carried over from the opinion into the new findings a mistake regarding clearance between Hornel and Earlville, which, months later, it characterized as a [fol. 5465] typographical error and said that the town mentioned should have been Hamilton. The mistake itself was unimportant, but its adoption by the plaintiff typifies the blind haste which has characterized the plaintiff's attempt to enjoy immediately the fruits of its victory.

The judgment was entered on October 31, 1945 and on November 9, 1945 an order was entered on consent extending the time to move under 52B to December 7, 1945.

Plaintiff's counsel particularly desired this extension because he was then engaged in the trial of the case of *U. S.* v. *Paramount, et al.* in the Southern District of New York, although this engagement had not prevented his tak-

ing time out to prepare and procure the entry of the findings and judgment.

Although the defendants had until December 7th to make their motion under 52B, the motion was made on November 10th, which was within the original ten days allowed by the rules, so that the extension was of no benefit to the defendants. This motion was noticed by the defendants for hearing on December 10th. On November 28th the plaintiff requested the defendants for further time within which to move to amend the findings of fact and for a postponement of the defendants' motion to amend which was then set for hearing on December 10th. This request was granted by the undersigned attorney and the hearing of the motion and the time to move to amend the findings was adjourned to February 4, 1946.

On December 6th the defendants made a motion returnable on December 17th to stay the execution of, or any proceedings to enforce, the judgment pending final determination of the defendants' motion under Rule 52B. The plaintiff thereupon requested that this motion likewise be [fol. 5466] postponed to February 4, 1946, and the undersigned counsel granted that request.

At this time in discussing the matter with plaintiff's counsel, the undersigned took the position that the pendency of the defendants' motion under 52B would suspend the operation of the judgment until the determination of said motion and cited to plaintiff's counsel in support of this position, *Moore's Federal Practice*, Vol. 3, page 3120, reading as follows:

> "In the April, 1937, Draft it was provided that 'the pendency of the motion (to amend the findings or make additional findings) does not affect the finality of the judgment or suspend its operation.' This provision was stricken on the theory that the motion should have such an effect.
>
> "It must be made *not later than* 10 days after entry of judgment. The motion may be made with a motion for a new trial. As to whether the time for the motion to amend can be extended, see Sec. 607, *supra*."

The defendants' motion under 52B was postponed from February 4, 1946 to February 25, 1946, because of the illness of the undersigned attorney and was argued on that

day. A few days prior to the argument the plaintiff filed a "Plan" under paragraph III of the judgment.

Upon the argument defendants' counsel (Mr. McClennen) argued that no plan should be considered or adopted until the Supreme Court had determined the defendants' appeal. The Court at that time seemed impressed with defendants' contention, but was more impressed by the contention advanced by the plaintiff that there should not be more than one appeal in the case and thereupon set a hear-[fol. 5467] ing on the plaintiff's plan for April 16th, with the requirement that defendants' objections be filed on March 25th. It should be borne in mind that at that time the parties and the Court were operating under the original judgment which expressly provided for a plan.

While the defendants were preparing their objections the Court on March 8, 1946 handed down a decision on the respective motions of plaintiff and defendants under Rule 52B, allowing each in part and denying each in part. However, among the plaintiff's requests granted were requests for amendments to the Conclusions and Judgment.

With the same haste that had characterized the submission of the original judgment, plaintiff now submitted to the Court a proposed amended judgment which contained not only the amendments granted by the Court in response to the motion, but which eliminated from paragraph III of the original judgment the second and third sentences which were the only sentences in the judgment relating to the submission or adoption of a plan. No request for this amendment was before the Court on the motion.

When this came to the attention of defendants' attorney, he directed the Court's attention to this fact and requested that the Court withhold entry of the new judgment until time had been afforded to check all of the provisions of the judgment with the Court's decision and ascertain whether there were any further discrepancies. A few days later the Court was advised that defendants' counsel had found no other discrepancies and that as to the elimination of the two sentences in question defendants' counsel did not take any position. In all frankness, at that time we had not had time to give serious consideration to the probable effect of [fol. 5468] the elimination, but felt that we had discharged our duty to the Court by calling it to the Court's attention.

The Court thereupon signed and entered an amended

judgment eliminating the two sentences. Therefore, the amended judgment, which is the only judgment now operative, contains no provisions whatsoever regarding the submission or adoption of a plan, and while it might have been argued that the original judgment was interlocutory and appealable only when it had been implemented by the adoption by the Court of a plan, no such argument can be made regarding the new judgment which is complete on its face and can be read and passed upon by the Supreme Court without any further implementation by the District Court.

It is not at all strange that the Court signed the judgment as presented by the plaintiff. In the first place, the Court undoubtedly felt that the plaintiff, as the successful party, should be given, so far as possible, the kind of a judgment that it requested. In the second place the Court was undoubtedly influenced by the quasi-judicial status which the Department of Justice is expected to and has traditionally occupied in litigation conducted by the Department. Unfortunately in this case, the plaintiff has disregarded this tradition and chosen rather to adopt the "hurry, hurry, hurry" attitude of the circus barker. Under these circumstances certainly no one but the plaintiff can be held responsible for the situation which presently exists.

The amended judgment was entered on March 29, 1946. The defendants' Objections to Plaintiff's Plan were completed and mailed from New York on March 29th before defendants knew that the amended judgment had been entered and before defendants knew that the references to the submission of a Plan had been deleted. On pages 8 and 9 [fol. 5469] of the Objections we discussed the situation as it existed at the time the Objections were being prepared and specifically reserved our rights in the premises. Shortly before the hearing on April 16th the plaintiff, without authorization under either the original judgment or the amended judgment, filed a "Reply to Defendants' Objections." Upon receipt of this paper the undersigned filed a motion noticed for hearing on April 16th, asking the Court to stay any further action under the second and third sentences of paragraph III of the original judgment, in view of the fact that these sentences had been eliminated from the amended judgment and that there was no further warrant for any action thereunder.

On April 15, 1946, defendants filed their notice of appeal from the amended judgment. The situation, therefore, at the time the undersigned appeared before this Court on April 16th was that an appeal had been filed from the amended judgment, but no order allowing the same had as yet been made.

This appeal was the subject of colloquy between the Court and counsel, appearing at pages *7, et seq.*, of the transcript of April 16, 1946. During this colloquy the undersigned flatly stated to the Court that the defendants' position was that the judgment on its face is complete and that there are no references therein to any plan requiring any action by the parties or the Court prior to the appeal. The position of the plaintiff was stated to be that there was no appealable order in the case and that there could not be an appealable order until there was an approved plan of dissolution. The defendants' position was put squarely before the Court at that time by the statement by the undersigned that the appeal which had just been filed did not [fol. 5470] require the consideration by the Supreme Court of any plan, that the amended judgment of March 29th is a complete final judgment as it stands and does not require any explanation or elucidation; and the question having been raised by the Court, the undersigned stated that when any plan was approved there would be another appeal.

The question was again raised on page 34 of the transcript and the Court in answer to an inquiry by plaintiff's counsel stated that as yet no order had been entered allowing the appeal. The undersigned thereupon (p. 35) pointed out that the allowance should be automatic.

On April 17th the Court signed the order allowing the appeal and subsequently a citation was issued, dated as of the day of the order.

It is the position of the defendants that with the allowance of the appeal and the issuance of the citation the jurisdiction of the case passes from the District Court to the Supreme Court and that the District Court has no further jurisdiction until the return of the mandate from the Supreme Court except to perform the ministerial acts provided for by the Rules of Civil Procedure and the Supreme Court Rules.

Plaintiff's counsel in effect conceded the correctness of this position when he argued that the amended judgment was not appealable until it had been implemented by the

adoption of a plan and in counsel's letter of April 22, 1946, addressed to Edward F. McClennen, Esq., which states among other things as follows:

> "Since the record that we should like to have incorporated in any appeal has not yet been completed, and since we would also wish to file a statement opposing jurisdiction until a plan to effectuate Section [fol. 5471] III of the judgment has been approved by the Court, we think the record on appeal would be simplified if the order of allowance were postponed until approval of such a plan."

The statement opposing jurisdiction to which counsel refers is provided for in paragraph 3 of Rule 12 of the Supreme Court Rules and we respectfully submit that if the plaintiff contends that the appeal has not been properly taken to the Supreme Court and that jurisdiction is not now vested in the Supreme Court, the only way that the question can be raised is under the above mentioned rule and a motion under Rule 7, paragraph 3.

Notwithstanding what we consider our very strong position on this point, we have consistently indicated our willingness to cooperate with the Court in endeavoring to arrive at a plan, but we have invariably been met by claims on the part of the plaintiff impugning our good faith, questioning our motives, charging that we are seeking only delay and, most recently, a Gromyko-like attitude of indicating an unwillingness even to attend a hearing which was fixed by the Court after consultation with counsel representing both sides.

The defendants have consistently reserved all of their rights with repect to jurisdiction and a continuance of plaintiff's arbitrary and unfair attitude may conceivably force us to give up our efforts to cooperate and to stand on our legal jurisdictional rights. If this should result in a confused situation, or in delay, which we are certainly not seeking, there will be nobody to blame but the plaintiff.

[fol. 5472]

II

The Consent Order of May 19, 1942

We thought that our discussion of the consent order in this case, which appears at pages 18 to 21 of "Reply Brief for Defendants", dated May 7, 1946 (which is included

infra) had completely laid the ghost of this order. However, when we received "Plaintiff's Comments on Defendants' Plan" we found that plaintiff places its main reliance, in endeavoring to persuade the Court to accept and approve its harsh and illogical plan, upon this order which was entered upon consent in May, 1942 for the avowed purpose of avoiding a trial of this case at a time when the country had only recently become involved in the most destructive war in its history, and which order expired on and was of no further force or effect after November 15, 1944. In using this order as an argument to prejudice the Court against the defendants at this time plaintiff wholly disregards the plain intendment of the order as set forth in paragraph II, subdivision 1, relating to jurisdiction, and the statement of defendants' counsel at the time the order was presented to this Court, which appears in the record of May 19, 1942, at page 8, as follows:

> "The defendants in this case, the exhibitor-defendants, have consented to the entry of this order and they are motivated very largely by consideration of the fact that under the conditions as they exist now the time of this Court, the time of Government attorneys, and the time of their own attorneys and their executives should not be taken up for a period which we estimate at six months in the trial of this case.
>
> [fol. 5473] "For that reason we have made what we consider very substantial sacrifices, and for that reason we have consented, subject to your Honor's approval, to the entry of this order."

The misuse which the plaintiff has made of this order, and its misrepresentations regarding the same both orally and in writing since the entry of the original judgment herein, are nothing short of outrageous.

The plaintiff in all of its proposals regarding the adoption of a plan has urged the Court to enforce the consent order as if it were still in effect, when at the very start of the order it is plainly provided that it "shall be in effect from the date hereof (May 19, 1942) to and including May 19, 1944." This date was subsequently extended to November 15, 1944, at which time it expired for good and all, and the defendants thereupon, on the very next day, filed a report showing five theatres still undisposed of and stating

that notwithstanding repeated efforts they had not been able to dispose of the same. The fact that all the defendants were required to do was to use their best efforts to dispose of the theatres named in the order is clearly shown by the next to the last paragraph of paragraph II, subdivision 4, of the original order and paragraph 4 of the order of May 31, 1944. The plaintiff never exercised the privilege granted to it under said last mentioned order to renew its motion for the appointment of a trustee, which privilege could be exercised only after "* * * the exhibitor-defendant shall fail to have made reasonable efforts to comply with said order, or shall have been unable at the expiration of six months from May 15, 1944 to dispose of said theatres." Nevertheless the plaintiff has consistently claimed that the failure of the defendants to dispose of these theatres was [fol. 5474] contumacious and justifies the Court now in entering a confiscatory decree for the dissolution and disruption of the remainder of the circuit.

Plaintiff states that by the acceptance of the six months extension provided for by the order of May 31, 1944, the defendants avoided the appointment of a trustee for the sale of the theatres. The opinion of the Court, dated May 4, 1944, provided that if Schine did not notify the Court in writing that it would accept the six months extension, a trustee would be appointed (not for the purpose of selling the theatres, but) for the purpose of making a survey of the theatre properties and advising the Court as to what action should be taken with regard to them. Furthermore, during the six months period, the defendants did succeed in disposing of four theatres, and upon the filing of the report of November 16, 1944, the Court and even the plaintiff, at that time, were apparently satisfied that the defendants had done everything possible to comply with the order. The plaintiff's reckless charges made for the first time with the submission of its plan four months after the entry of judgment and fifteen months after the final report fairly illustrates the willingness of the plaintiff to go to any lengths to destroy the Schine Circuit.

The plaintiff's statement that no disclosure as to Mount Vernon was made to plaintiff until the filing of our objections is untrue. This situation was discussed at length in Washington with representatives of the Department of

Justice early in November, 1945, at the time that the lease was about to expire. The argument advanced by the plaintiff in the paragraph beginning at the bottom of page 4 of its "Comments" is particularly unfair and unwarranted. Here the consent order is treated as an admission of wrongdoing, whereas in entering into the stipulation covering the [fol. 5475] order the plaintiff expressly agreed that no violation of the Sherman Act was admitted. Furthermore, the injunctive provisions of the order do not presuppose or admit that the defendants were currently violating the law or engaging in the practices covered by the order, whether legal or illegal, but simply stated that the defendants would not in the future engage in any such practices without dealing with the legality or illegality thereof. We are frankly unable to understand how the Department of Justice, in the exercise of its quasi-judicial functions, can bring itself to suggest to the Court that the consent order can be used as evidence of any violation of the Act or of the existence of any "specific conspiracies" as indicated in the fourth line of the paragraph now under discussion. We frankly state to the Court that it is our honest belief that after reading the plaintiff's "Comments" the Court cannot possibly have any confidence in any of the contentions advanced by the plaintiff on the subject of implementation of the decree.

The plaintiff in the introductory paragraph of its "Comments" in addition to erroneously referring to the consent order as a "Plan to prevent the defendants from continuing to violate the Sherman Act in the conduct of their film business", states that the plaintiff's part of the agreement was the continuance of the suit for a two year period. The fact is, that both the plaintiff and the defendants desired to avoid the trial of this case during the critical period in which the country had only recently found itself. The defendants' statement to that effect was made by the undersigned counsel in open court and the plaintiff's statement to that effect was made by Mr. Thurman Arnold, the Assistant United States Attorney General, to the undersigned in Mr. Arnold's office in Washington, D. C., on the Saturday before the entry of the order when, in discussing [fol. 5476] the order, Mr. Arnold stated in the presence of Mr. Wright, in substance, that he had other matters in which he could more profitably use Mr. Wright's efforts and that he would be very glad to avoid the trial of the case at that time.

Mr. Wright himself stated to the Court at the opening of the trial in May, 1944:

> "The purpose of the order was, of course, to preserve the *status quo* pending the continuance of this suit and I assume that the order was obeyed."

III

In Re Plaintiff's Comments on Defendants' Plan

On page 2 of the "Comments" the plaintiff attacks our contention that there is no evidence indicating that the defendants have eliminated competition by the use of methods which are violative of the Sherman Act. We have reviewed the Findings and Conclusions and are unable to find any Finding or Conclusion to that effect.

The plaintiff refers several times throughout the Comments to the individual owners; i.e., J. Myer and Louis W. Schine, as having violated the Act and being "guilty", but a review of the Opinion, the Findings and the Conclusions reveals no reference to the individuals as such. This is quite different from the situation in the *Crescent* case where, notwithstanding specific findings against the individuals, Sudekum, Stengel and Rosenbaum; they were permitted to remain as owners of circuits so long as no two of them were interested in the same circuit. This same result is accomplished under Plan 3.

On pages 3 and 4 the plaintiff now admits that it has changed its position regarding the remedy to be applied, as we contended in our objections, but now says that the plan [fol. 5477] proposed by the plaintiff is not as drastic as that outlined in its main brief. Plaintiff further says that the divestiture suggested at page 60 of its main brief was that approved by the Supreme Court in the *Crescent* case. We claim that our Plan 3 comes as close to the remedy applied in the *Crescent* case as is possible under the physical setup of the theatres embraced in the Schine Circuit.

The plaintiff's claim that the record of the Schine defendants in suppressing particular theatre operating competition was considerably less favorable to them than that made by the *Crescent* defendants, is wholly untenable. The *Crescent* case was the first of the four cases involving a motion picture industry to be tried, and it was tried first

because the plaintiff wanted to puts its best foot forward. The findings in the *Crescent* case consist of 187 Findings of Fact covering 144 printed pages. Contrast this with the 32 findings prepared by the plaintiff in this case, which consist of nothing more than a paraphrase of the Court's opinion.

The plaintiff's whole attitude is typified by its characterization of the judgment in this case as "the Court's *dissolution* judgment" (italics ours). This in spite of the fact that the use of the words "dissolution by the Court" was in its classic rather than punitive sense and that the Court plainly indicated its unwillingness to apply this harsh remedy.

Even when the plaintiff was arguing the *Paramount* case in the Southern District, it said to the Court, when discussing what it would do in the case of *Twentieth Century-Fox* if it had its way, that it would dissolve National Theatres Corporation, which is a holding corporation forming the link between Twentieth Century-Fox, as distributors, and "five large circuits in which National owns all of the stock, all of the National stock being owned by [fol. 5478] Twentieth Century-Fox Film", and that "in short, we submit that the law requires that each of the theatre operating affiliates of each of these defendants must be made to stand on its own competitive feet by dissolution measures of the kind that have already been applied to much smaller units in the industry." (See arguments in *United States* v. *Paramount, et al.*, a copy of which has been supplied the Court, at page 2577, *et seq.*

Note that counsel referred to "positive dissolution measures". Further note, that the only cases counsel could have had in mind were the *Cres-ent* case and this case. In the *Cres-ent* case the separate circuits were not disturbed, except to be put under non-interlocking control, and that is what the plaintiff was arguing for in the discussion above referred to when it contended that each of the five large Fox Circuits should be made (and, of course, permitted) to stand on its own feet. At the time of this argument the plaintiff had not as yet even submitted a plan in this case.

After reading the "comments", page 5, we are now puzzled as to why the plaintiff cited the authorities referred to, in the first place. We had been under the impression that these cases were cited in the "reply to defendants'

objections" to indicate the nature of the remedy customarily applied in anti-trust cases, but, after our analysis of these cases (pp. 13 to 17 of reply brief for defendants, dated May 7, 1946), showing that the realignment or reorganization ordered left the beneficial ownership unchanged, plaintiff, now, "comments" that the remedy discussed with approval by plaintiff in its "Reply" is not suitable or adequate here. Why? We know of no cases and certainly none are cited by plaintiff where a more drastic remedy has been adopted.

[fol. 5479-5512] The plaintiff's statement that if the decree in this case was not intended to divest the defendants of any theatres of any kind or description, then the trial of this suit was a nullity, because the plaintiff had already obtained by consent a limited theatre divestiture and the main purpose of the trial was to determine the extent to which further divestiture should be ordered, verges on the ridiculous.

The purpose of the trial was to prevent alleged violations of the Sherman Act, and if this can be accomplished by injunction, the remedy should be so limited. The divestiture provided for by the consent order was simply a concession made by the defendants as to the theatres which they had acquired since the trial started thereby voluntarily giving the plaintiff the benefit of an injunction *pendente lite* which it had sought from the Court, but had been denied. What the plaintiff is trying to do here is to apply to the small circuit operated by the defendants a special rule, while permitting the rest of the 17,000 motion pictures theatres in the United States to continue to operate as they did in the past and in the same manner as did the defendants prior to this law suit.

The plaintiff's plan should be rejected *in toto*.

If any realignment is necessary the proposals submitted by the defendants are sufficient to accomplish the purpose of the judgment.

Respectfully submitted, Willard S. McKay, Attorney for the Defendants. Arthur Garfield Hays, Howard M. Antevil, of Counsel.

[fols. 5513-5514] IN UNITED STATES DISTRICT COURT

[Title omitted]

DEFENDANTS' MOTION FOR STAY

The defendants move the Court for a stay of all proceedings in connection with consideration, approval or enforcement of any plan or plans of dissolution, realignment or reorganization, said stay to continue until the determination by the Supreme Court of the United States of the Plaintiff-Appellee's motion to dismiss Defendant-Appellant's appeal, which motion is presently pending before it, and in the event of the denial by the Supreme Court of the said motion, the stay to continue until final disposition by the Supreme Court of the present appeal itself.

Respectfully submitted, Willard S. McKay, Attorney for the Defendants.

Arthur Garfield Hays, of Counsel.
Dated New York, N. Y., June 7, 1946.

[fol. 5515] IN UNITED STATES DISTRICT COURT

[Title omitted]

Transcript of Hearing

Proceedings had before Honorable John Knight, United States District Judge for the Western District of New York, at the U. S. Court House, Buffalo, New York, Monday, June 17, 1946, at 10 o'clock.

APPEARANCES:

Honorable George L. Grobe, United States Attorney for the Western District of New York, by Robert M. Hitchcock, Esq., Special Assistant U. S. Attorney, of counsel, for the United States of America.

Willard S. McKay, Esq., and Hays, St. John, Abramson & Schulman, by Arthur Garfield Hays, Esq., and Seymour M. Heilbron, Esq., and Howard M. Antevil, Esq., of counsel, for the Defendants.

[fol. 5516] Mr. Hitchcock: Your Honor, such opposition as there is to this motion is contained in a letter which

was just handed to me by Mr. Grobe. It refers to a lett
that was sent to you by the Government in reply to o
which was sent to you by the attorneys for the defenda
and states that the Government's position is fully stat
in that letter to you.

I suggest that if Counsel want to be heard in argumen
if your Honor cares to do so, you could hear their argumen
then if Counsel for the Government want to submit an
thing in opposition that they be given a lim ed time
do so.

The Court: This is a motion to stay——

Mr. Hitchcock: This is a motion to stay all proceeding
I am not familiar with it. And as I understand it, th
have no objection to a stay of execution but they do hav
objection to the stay of all proceedings.

The Court: It isn't a question of staying execution;
is a question of whether a plan be submitted and approv
now. Is that it?

Mr. Hays: I might make it clear, your Honor, that in o
argument we are not going to ask for a stay in the heari
of evidence.

[fol. 5517] The Court: No. That has already been a
gued. I will hear you.

Mr. Hays: If your Honor please, since we were last b
fore this Court the Government filed a motion asking t
Supreme Court to dismiss our appeal on the ground th
the judgment appealed from was not a final one.

The Court: Yes.

Mr. Hays: In other words, they left to the Supreme Cou
the question of whether our appeal is sound or not; a
we think that pending that nothing should be done in th
case except perhaps the hearing of evidence as we ask
before so that we can get all the evidence on the recor
Then, if the time comes when a plan is presented, yo
Honor will have all the evidence before you upon whi
to base a plan.

One thing we feel sure of is that our appeal is not prem
ture, and our reason for asking this stay is this: Ev
today, with these suggestions of a plan which might bri
about divestiture of theaters, we get constant inquiri
about the prospects of change in our business. Our e
ployes naturally wonder what is going to happen, natura
[fol. 5518] discuss the matter with competitors, natura
have in mind that certain theaters are going out of busine

As a result, any plan promulgated at the present time would be harmful to us. Now, we haven't brought this motion before the Supreme Court; the Government brought the motion. All we ask is that these proceedings be stayed except for the taking of evidence.

The Court: How does the appeal have anything to do with it? If the appeal were sustained we would be right back here with a plan. Why, in the meantime, while the matter is still pending before the Supreme Court, shouldn't a plan be submitted so that if the appeal is finally sustained it will be submitted with the whole case?

Mr. Hays: Because, your Honor, one very important thing is the continuity of our business, the stability of our business, and we are afraid of what will happen to our business if rumors get around that we are being required to divest ourselves of theatres.

The Court: Well, that is the situation now. But even if you are sustained in your appeal from the judgment, you would still go along, the plan would be submitted, and it [fol. 5519] would necessitate another appeal, doubtless.

Mr. Hays: But your Honor, that would do us a great deal of harm.

The Court: Well, how are you going to obviate that?

Mr. Hays: Why, by taking up this appeal and finding out whether we are right or wrong. We claim that this Court has no jurisdiction at this time, and that that was the situation before the Government came along and made its motion in Supreme Court to dismiss the appeal. We now ask that until the Supreme Court determines whether our appeal is proper that this Court shouldn't make any further orders.

The Court: Well, that is the same question we had before.

Mr. Hays: Yes, and we hesitated to come before the Court and make a motion on it. Now the Government has done that very thing. And, let me add, your Honor, that a great deal of water has passed under the bridge since we were here last. The Paramount decision seemed to me very, very important.

The Court: I don't know. I have examined that decision several times. It seems to me they criticise the very same things that this Court criticized, exactly.

[fol. 5520] Mr. Hays: That is true. But the decision in the Paramount case brings about a complete change in

the industry. The chief argument of the Government here was that the Schine buying power restrained competition. Now that argument no longer exists because the whole industry is changed. The decision in the Paramount case finds that the moving picture companies violated the Anti-trust Law but deals with the situation by injunction and re-arranges the whole industry.

The Court: Will it require the separation of different companies in the Paramount case?

Mr. Hays: In the Paramount case no divestiture of any kind is ordered.

The Court: Oh yes, where two companies are held together——

Mr. Hays: You mean one is to sell out to the other?

The Court: Yes.

Mr. Hays: A situation that I don't understand exists in our case. The chief impression I got from the Paramount case decision is that the Court decided, as it did, against any divestiture because of public interest. That is, instead of compelling theatres to be sold to other people, they said no; that these theatres were successful because of the [fol. 5521] energy and zeal of the operators, and that, because of public interest, they would not direct a divestiture if they could accomplish a restoration of competition otherwise.

The very first time I went to Washington on this case I was met by the never-ending cry of "Delay". I told Government Counsel that if they were fair they would wait to see what light the Paramount decision would throw on the situation. Now the Paramount decision has come down. There is no longer any danger in a group which has a large buying power monopolizing the industry, because from now on pictures are to be sold competitively, one by one.

But all that has to do with a plan—which I am not arguing now. I am trying to lay stress on the fact that here we have today a situation which is completely changed. There are so many other things in this Paramount decision that I think are particularly important: The whole question of clearances is solved; the whole question of franchises is solved.

The Court: How are clearances solved, and franchises? There is still nothing in the law that says they can't obtain [fol. 5522] them. There is nothing obligatory in the law,

as far as clearances are concerned, that says what you shall do.

Mr. Hays: The Court directs, as I understand it, arbitration, and lays down certain standards under which clearances are to be determined.

The Court: That hasn't been done in this case.

Mr. Hays: No.

The Court: I realize that.

Mr. Hays: Another thing which is almost exactly in point on my argument here is that in the Paramount case the Court directs that proceedings shall be stayed pending the appeal. In other words, the Court allowed just what we are asking here, that pending appeal nothing further be done.

Now, the Government in its letter suggests that I have abandoned my plan of taking evidence. I haven't abandoned that at all. Even if this case is reversed, before any plan is promulgated I would still ask to take evidence. As I have told your Honor before, I am not trying to delay things, and I would be ready to take any evidence we can in the interim so that no time is lost whatsoever. What I am trying to persuade your Honor to do is not to enter any orders pending the appeal in Supreme Court.

[fol. 5323] The Court: I assume if there is a reversal of the judgment by the Supreme Court it would be a reversal of the plan that goes with it. You have your whole case there. I think you should go ahead with the case. If the outcome of the appeal affects the plan, the plan should be submitted too.

Mr. Hays: Suppose your Honor were right, and suppose we go to a final order here. Then suppose the Supreme Court, on this present motion the Government makes, refuses to dismiss, on the ground that this is an appeal from a final order. In that case your Honor has no jurisdiction. Now, the Government is raising that question in the Supreme Court——

The Court: Refuses to dismiss? You mean——

Mr. Hays: They have made a motion to dismiss, and we ask your Honor to do nothing further until that motion is decided.

The Court: I know, but I don't see how that has anything to do with it, because if your appeal is sustained then you will go right ahead and submit a plan, and then the plan and the whole case will go before the Supreme Court.

Mr. Hays: Well, I haven't made myself clear then, your [fol. 5524] Honor. As I understand, the Government's present motion is to dismiss our appeal on the ground that we are not appealing from a final order. Now, if the Supreme Court refuses to grant that motion to dismiss the appeal, that means we are appealing from a final order and it means this Court has no jurisdiction until our appeal is heard and determined by the Supreme Court.

The Court: Why do you say we have no jurisdiction if the appeal is sustained as being one from a final order?

Mr. Hays: You mean if our right to appeal is sustained?

The Court: Yes.

Mr. Hays: You have no jurisdiction, as I understand it, because we having appealed, all jurisdiction is now in the Supreme Court, and not in this Court at all.

The Court: I think this Court retains jurisdiction to pass upon a plan that is in accordance with the judgment itself.

Mr. Hays: I think that having taken our appeal, this Court has no further jurisdiction, and the whole matter is in the hands of the Supreme Court. And if the Supreme Court takes a position affirming your Honor's judgment, [fol. 5525] then I think a plan would have to be determined by you. But I can't see how anybody would lose anything by your Honor's granting our motion for a stay if, for instance, you were to permit us to take evidence in connection with these theatres before any plan is promulgated. We can do that in the meantime. All I am asking is, while this motion before the Supreme Court, and the appeal, is pending——

The Court: Well, this case is pending for seven years—since 1939. Of course, perhaps a considerable portion of that time was justifiable delay. But I think it ought to be closed up before long.

Mr. Hays: May I ask your Honor if the passage of time hasn't been helpful, as a matter of fact? The whole of the motion picture industry is involved, and we are simply a small segment of it. I think the Paramount decision ought to be very helpful to your Honor in determining what should be done in connection with any plan.

The Court: I think that decision is helpful to some extent, that is true. I think there are features of it that are important here.

Mr. Hays: Well, let me make this statement as to the Paramount decision: We certainly are entitled to equal [fol. 5526] justice with the other companies, and without discrimination. And where you have a decision of that sort, that remodels the whole industry, makes it do business on an altogether different basis, it seems to me that must be taken into consideration in connection with what we are to be required to do under a like judgment that we had violated the Antitrust Law. I think it gives us all an opportunity to consider the whole industry together, and for that reason any delay that has occurred up to the time of the Paramount decision, I should think, your Honor would regard as quite helpful.

The Court: The Paramount decision might have bearing along the line of suggesting changes as far as the dealings with the major companies or distributor companies are concerned, but it wouldn't go to the question of the monopolistic practices within the Schine organization in the acquisition of theatres.

Mr. Hays: Well, it takes away the only argument of the Government that the buying power in the Schine organization has put them in an unfair competitive position, and that is the only reason for which they say they want to [fol. 5527] divest Schine of theatres. And it also makes clear the fact that the Government is not trying to punish the violators but is trying to bring about a situation where there will be fair competition between them. For these reasons I should think it would be a relief to the Court to know that we can be treated in a fair manner.

But that is not what I am asking for here. My argument here is that, the Government having seen fit to make a motion to dismiss our appeal, where there is such an issue between the Government and us on that matter, I can't understand why we are not entitled to a stay until that matter is heard.

They didn't come to this Court; they went to the Supreme Court. They say this is not a final order. If it is a final order, it is an appealable order, and we are asking that we be permitted to go to the Supreme Court just as fast as we can to have that question determined, and while it is being determined all we ask your Honor to do is to stay these proceedings and not hurt our business.

We would agree to a stay of execution pending appeal, but a great deal of harm will have been done in the mean-

[fol. 5528] time. Letters come in by the hundreds, day by day, from people talking about the insecurity of our organization. We feel that—if this is a final order and if this appeal is heard—we are entitled to have things remain as they are, and now particularly, since the Government has put the matter up to the Supreme Court and taken it out of the hands of this Court.

The Court: Of course, you have to make a distinction between the Paramount case and the Crescent case. The Supreme Court decision is superior to the Three-Judge Court decision—I don't argue that for a moment. But I do say that the Crescent case involves the very questions that are here, while only some of the questions involved in both cases, clearances and other things, were decided in the Paramount case.

Mr. Hays: All that the Paramount case did was to find that these practices pointed out in the decision are in violation of the law. That is all. Then it provides for injunctions and grants a stay pending appeal. And here, where we ask the very thing which the Court granted there voluntarily, we are met with opposition. I don't understand why we should be in one position and the big com-[fol. 5529] panies in another, because these practices weren't developed by one small chain; they were developed by the whole industry. All I ask is that my client be treated as well as the others.

Of course, it is difficult, your Honor, to argue here without an opponent, and with the rather contemptuous attitude of the Government of just paying no attention to what we say. How can they come before this Court and say they want to do something to correct the situation by promulgating a plan that may cause our business a great deal of harm, and at the same time ask the Supreme Court to decide that my appeal is not proper?

The Court: When they say your appeal is not a proper one, they assume you can appeal when the plan is in and submit it as part of the whole record. Then, of course, certainly, there would be an appeal, so you wouldn't be deprived of any rights.

Mr. Hays: I think that was so at one time, your Honor, when the judgment here was interlocutory. But then the Government, perhaps in haste, or for some other reason, made it what we regard as a final order.

The Court: I don't see how a great deal of harm can [fol. 5530] result as far as your rights are concerned, because the whole question will come before the Supreme Court eventually. The purpose of your motion, as you have pointed out, is to stay the action pending the decision on the one question.

Mr. Hays: May I point out, your Honor, there is a great difference in life between legal rights and business conditions. I say that any judgment that would have to do with disposition of theatres or would jeopardize our owning of theatres pending appeal would hurt our business tremendously. We want to be in a position of having certain continuity of business, without orders of the Court, pending our opportunity to get to the Supreme Court to determine our rights.

But where would there be any delay, your Honor, if you would grant a stay pending a determination by the Supreme Court? I am hopeful that your Honor will permit us to put in evidence here, and I get a great deal of comfort from the Paramount decision where they show the changes in the industry for every year. For instance, under that three-year stipulation, you will remember that every time a theatre wanted to do anything, buy a new theatre, it had [fol. 5531] to show the changes in the conditions. I feel that all the way through we should be permitted to show what the changes in the situation are before your Honor works out a plan in order to develop a situation where you will maintain competition.

I am perfectly satisfied to put in evidence on that question in the meantime, and I am willing to except that from the stay. I can't see how the Government loses anything thereby, and it will save a situation that is very unfortunate for us, and burdensome, and causes us a loss of money. Perhaps the Government attorney can tell me where there will be harm in such a procedure, but I can't see it.

The Court: I have given this matter a great deal of thought, and have seriously considered what I would do—and I am not changed by your argument, because I think these matters can all be taken care of at the proper time. I am going to deny your motion to take additional evidence, and also deny this motion for a stay.

I see no reason for taking any additional evidence. We have had sufficient evidence before the Court, it seems to me, from which to determine some type of plan to be

[fol. 5532] adopted. I think that plan should be submitted promptly so that the matter can be disposed of. That is my idea about this case.

Mr. Heilbron: If your Honor please, we have prepared a memorandum on this motion. Wouldn't your Honor want to read that memorandum before taking action about it? We have taken the trouble of printing it so that our position would be stated more clearly than anything that might be said in an exchange of letters, which is the only opportunity we have had of stating our position thus far. May I present to the Court this memorandum before the determination of the motion is made? I have already given the United States Attorney a copy of it.

The Court: I don't know about that. I know able Counsel here has covered the ground very thoroughly. He is capable of doing it.

Mr. Hays: Apparently not very effectively, though, your Honor.

The Court: Well, sometimes we don't see behind the effect.

Mr. Heilbron: I know that your Honor would not want to disrupt and ruin a thirty-year old business, if your Honor happens to be wrong and the Supreme Court reverses you.——

[fol. 5533] The Court: I don't see why you say, 'disrupt your business' before the plan is submitted. There can be no disposition of theatres pending that.

Mr. Heilbron: You don't ruin somebody's business merely by saying, "You have to sell a theatre." But I have in my hand a copy of a newspaper published in Carthage, and here is what is happening: This circuit has employes. Your Honor signs an order for a plan that does these things. If we lose an employe who is in the assistant bracket and who is looking for promotion we can't replace him because we are regarded as a business in liquidation. There is nothing to be gained, if your Honor happens to be reversed, in destroying a business pending a decision of the Supreme Court. All we ask here is that before that decision comes down from the Supreme Court we be permitted to remain in *status quo*. I think that Judge Hand, and the other judges on the Expediting Court, had that in mind when they wrote a direction for stay into the opinion in the Paramount case. They didn't even wait for the defendants to come into court and say, "Grant us a stay." They

wrote, inherently, into the opinion a direction that a stay should be written into the decree. Here is what they said—[fol. 5534] and I am reading from Page 66 of the printed copy of the Paramount decision:

"Proceedings under the decree to be entered shall be stayed pending appeal."

They don't stay execution; they stay proceedings pending appeal. That is what we are asking for here. I don't see any difference between our case and the Paramount case from the standpoint of proceedings being stayed.

The Court: Was there any stay in the Crescent case?

Mr. Heilbron: No. But I am coming to that, if your Honor please, because you have referred to the Crescent case. The Supreme Court of the United States does not choose the cases to come before it. The Government, however, chooses the cases that it will bring before it. This Paramount case, in the interest of orderly procedure, is the case that should have been presented to the Supreme Court first. As a matter of fact, Attorney General Clark in 1942, in this very case, asked for a six month adjournment so that the whole thing could be readjusted in the light of conditions in the industry. And if your Honor will read through your own opinion, you will see there is [fol. 5535] not one element in your opinion that does not depend on the determination of the Paramount case. Why do I say that? Because everything with which these defendants are charged is basically——

The Court: Well, you are in error about that.

Mr. Heilbron: In what respect?

The Court: In respect to the methods employed by these defendants in the acquisition of theatres, the elimination of competition. Those things do not appear in the Paramount case.

Mr. Heilbron: I recognize that, and I can say this: That it would have been useless for one exhibitor to go to another and say, "I'm going to build a theatre," unless he was previously armed with franchises, with clearances, and with the ability to get product. As the Court says, merely to build a theatre is not an act of unfair competition, or merely to say that you are going to build a theatre, unless that act or that statement is coupled with and has a direct relationship to the getting of product.

The Court: That is very true, but you are begging the question there. You don't state the record as it appears

[fol. 5536] in this case as to the acquisition of certain of these theatres.

Mr. Heilbron: Then we are back on the same question of penalty we had here before.

The Court: In other words, the record in the Paramount case doesn't show efforts on the part of any of these companies or their subsidiaries to eliminate competition, or acts committed by the representatives of those companies.

Mr. Heilbron: Under the law, we are considering not the imposing of penalty here; we are considering a plan.

The Court: That is very true. We are considering the question of restoring competition.

Mr. Heilbron: Yes. And in the Paramount decision they lay down the only sensible method by which that can be done, because you must treat the problem, as that Court says, upon a nationwide scope.

The Court: How do you read it from your standpoint as being consistent with the Interstate case?

Mr. Heilbron: The answer is easy. The Paramount case wasn't decided at that time. I would like to have Mr. McKay answer that, your Honor.

Mr. McKay: If your Honor please, the Interstate case was not a divestiture case.

The Court: That is true. The Crescent case is.

[fol. 5537] Mr. McKay: In the Crescent case there was not the kind of divestiture that the Government is suggesting in this case.

Mr. Heilbron was in error when he said there was no stay granted in the Crescent case. In the decision in the Crescent case there was a stay of one year, which stay has been continued, as I have previously pointed out to your Honor, so that the action is now stayed until July.

I venture to predict to your Honor that there will now be a motion made in the Crescent case to remand it to the District Court for modification of the decree to make it consistent with this Paramount decision.

Now, your Honor, what has happened in this Paramount case is something that could have happpened right here in this Court, if the Government hadn't dismissed the distributors from this case. If they had been here, before your Honor, you could have done exactly what the Expediting Court did down in the Southern District.

I have pointed out in my memorandum that we don't cite this case to your Honor because it is binding on this Court. We cite it because it is binding on us—not only on us but on [fol. 5538] every exhibitor in the industry. From now on every exhibitor in the industry will be required to do business according to the decree in the Paramount case.

If your Honor will note the paragraph here on divestiture in the Paramount opinion—which I sent you the minute I could get hold of it——

The Court: I have read it.

Mr. McKay: —you will note that the Court deals with the various companies and points out that they own maybe four per cent or three per cent of the theatres—I roughly figure that the Schine theatres amount to eight-tenths of one per cent—and the Court says that that is insignificant and cannot effect a monopoly. Right in the same paragraph it refers to the Crescent case and says there is no reason for taking these theatres away.

The Court: It ignores the fact that numbers do not necessarily create a monopoly. The holding may be only half of one per cent, but at the same time that half of one per cent may be a monopoly because of the monopolistic efforts of the half of one per cent.

Mr. McKay: It is entirely possible, your Honor, that [fol. 5539] they might create a monopoly when coupled with practices in the industry which were common at the time these lawsuits were started.

Now, I have asked your Honor to bear in mind in this case that this motion picture industry is a young industry. It has had to feel its way, and practices that have been indulged in in the industry have been arrived at by trial and error. The Paramount case is the first case where any court has actually had the chance to take the problem as a whole and deal with it at its source.

Your Honor would have had that chance, but the Government took it away from you when they took the distributors out of this case. I think that your Honor probably would have arrived at the same conclusion, because it is significant that the same practices which you cited in your opinion are the very practices that the Expediting Court, having before it the sources of the business, took out by their roots. You could have done that, but the Government took the distributors away and deprived you of that opportunity, and they took them away over our objection.

[fol. 5540] I don't believe your Honor wants to hurt this circuit. You have said so many times. You have said all you want to do is to see that the law is enforced.

Here is the first time we have had an opportunity to know exactly how this business can be conducted so that there will be no danger of violation of the Act.

How can there be any buying power when each picture gets put on the auction block and every exhibitor in the competitive area has a chance to bid for it? It doesn't make any difference that these exhibitors are not parties to the Paramount decree; they are bound by it just the same.

The same thing applies to clearances. Last time we were here your Honor asked what would happen to clearance assuming the effect of the Paramount decree were in some way taken away, and you predicted to me right then that some method would be found whereby this clearance arbitration system would be continued. That is exactly what has happened.

What difference does it make if a distributor, no matter [fol. 5541] how strong, wants to give forty days clearance, when Paramount and Metro and Fox are permitted to give only ten days because ten days is all the arbitration system will allow?

The arbitration system has been extended to cover other disputes, so that an exhibitor has the right to have considered such questions as whether his bid was fairly considered.

Franchises, under this decision, are thrown out completely.

Now, I take your Honor back to the filing of objections: When we filed those objections we endeavored in one part, at the end of our objections, you will remember, to meet by practical suggestions the abuses which your Honor had pointed out in your opinion. We stated there what we would do and what we were willing to do in that regard.

Your Honor has never indicated any feeling about that matter, but it is entirely possible that there may be in your Honor's mind the thought that we being such a small circuit, a simple injunction against us would not provide an effective remedy.

But now you have an injunction against the people from [fol. 5542] whom we have to get our pictures, and, therefore, I say, your Honor, with that in view, the objection ceases to

exist. That injunction answers the whole problem. It does away with any possibility of a recurrence of those abuses.

As far as the Crescent case is concerned, I say that this case is right in accord with the Crescent case with respect to divestiture. In the Crescent case, where there was an interlocking ownership, where two circuits had been operating separately and then came together within the Crescent circuit, the Court made those two circuits separate. And that is all it did.

The Court: Well, the same question wasn't involved there, the association of several companies in one circuit.

Mr. McKay: I feel that these questions need very careful study by your Honor, because, I say to your Honor in all frankness, there isn't a man in the motion picture industry today who can prophesy the methods which are going to be applied in the industry after this decision is fully understood and assimilated.

It is going to revolutionize the industry, but it is going [fol. 5543] to revolutionize it into what looks to be like sort of a public utility, so that anybody will be able to come in and buy any picture that he can pay for. That is why the Court said that an ownership of three per cent of the theatres in one company constitutes no danger.

The Court: Of course, numbers are not necessarily controlling; the question is how they operate.

Mr. McKay: Well, there was some testimony here as to admission prices. That is about the only thing I recall concerning which there was actual complaint. We can't do even that any more. Minimum admission prices are abolished, franchises are abolished, by this opinion.

The Court: Well, the question of admission prices was only one feature of this case.

I will be glad to look over your papers and consider it further. But I have given the whole matter a great deal of thought in the light of the motion itself, and it isn't a matter of first impression, as you might say. As I look at it, this whole question might best go up on appeal together.

So far as the plan is concerned, it isn't my view that [fol. 5544] every theatre involved must be sold. I believe it can be accomplished in three ways: By dissolution in part, reorganization in part, and re-alignment in part.

Mr. McKay: May I ask your Honor this: If, after consideration of our memorandum and the entire problem, you still feel that some plan should be promulgated by proof before this Court, may I ask that there be not a formal, but informal, conference with Counsel so as to try to work whatever plan you feel you may want to approve into the picture of the entire industry as indicated in this opinion?

The Court: Well, I will consider that question. I haven't any definite ideas in mind about this matter that I have formulated.

Mr. Hays: Your Honor, what arouses me is that I think the Government is unfair to the Schine circuit. They are exercising pressure, they are ignoring our motions, while, I notice, in the Paramount case they never asked for divestiture of theatres except where they were used unreasonably to restrain commerce.

In the opinion in the Paramount case the court refers to the fact that divestiture would be damaging to the public [fol. 5545] interest as well as to the defendants, and would not accomplish any purpose at the present time. Now, why should the Government exercise pressure to hurry our case and ask the Court for orders which will injure our business——

The Court: I don't think it hurries. Instead of having two appeals you would have one; that is all.

Mr. Hays: I know, but we have an appeal now on a question of law whether we violated the Antitrust Law. What the Government wants is for you to approve a plan before that question is determined.

The Court: Then you would appeal from the plan as proposed all in one appeal.

Mr. Hays: Well, all I can say, your Honor, is to repeat it will do a great deal of harm.

The Court: It would make two appeals otherwise, wouldn't it?

Mr. Hays: I am hopeful it wouldn't make two appeals, because I am hopeful we would reverse.

The Court: If the judgment were sustained there would be another appeal?

Mr. Hays: If the judgment were sustained there would be another appeal, yes, sir, from the plan. But why they should trouble anyone, or harrass anyone, I don't [fol. 5546] know, because it seems to me the whole situation

is being cleared up these days because of the changes brought about in the industry by this Paramount decision.

Another thing I don't understand is when the Government comes before the Supreme Court and makes a motion to dismiss our appeal, why the other questions before this Court shouldn't be held until the Supreme Court determines whether we are wrong or not. In the meantime, things are going to happen that will hurt our business.

Mr. McKay: Your Honor, I hope you weren't unduly impressed by the offhand statement that does appear in the record to the effect that this Schine circuit is one of the largest independents in the United States. As I recall, it was made by one of the distributors, and we didn't consider it important enough to go into at that time. But if your Honor has that in mind, the Schine circuit has 150 theatres out of 18,000.

The Court: Oh, no, I didn't have that statement in mind. As a matter of fact, I didn't know whether it was first, second, or third.

[fol. 5547] Mr. McKay: And I might also say, your Honor, if there is any importance attached to the prospect of there being one appeal or two appeals, it appears to me that if we are not successful on our first appeal, and the plan is something that we feel is improper, there doesn't seem to be any way of avoiding two appeals. Our first appeal will reach the Supreme Court in October, and any second appeal wouldn't be reached until some time after that.

The Court: You might like my plan.

Mr. McKay: We might, that is true.

Mr. Hays: That would settle everything.

Mr. McKay: Except, of course, if it is found that we are not violating the Act, then we would not have to do anything.

Mr. Hays: Wouldn't it be helpful to file a memorandum as to the effects of the Paramount decision on this case?

The Court: No, I don't think so. We have been seven years with this case on the calendar.

Mr. McKay: The Paramount case was eight years on the calendar. May we have the opinion in the Paramount case considered as part of Mr. Hays' affidavit?

[fol. 5548] The Court: Yes.

Mr. Hays: I think from the seven years you ought to eliminate the War years, your Honor.

The Court: Oh, yes.

[fol. 5549] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER DENYING MOTION FOR LEAVE TO TAKE FURTHER TESTIMONY

Upon consideration of the defendants' motion for leave to take further testimony in this suit and the argument of counsel in connection therewith, it is hereby

Ordered, that said motion be denied.

(S.) John Knight, United States District Judge.

Dated: Buffalo, N. Y., June 24, 1946.

[fol. 5550] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER DENYING MOTION FOR STAY

Upon consideration of the defendants' motion for a stay of proceedings, in connection with the consideration of a plan to effectuate section III of the judgment heretofore entered herein, and the argument of counsel in connection therewith, it is hereby

Ordered, that said motion be denied.

(S.) John Knight, United States District Judge.

Dated: Buffalo, N. Y., June 24, 1946.

[fol. 5551] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

Civil No. 223

UNITED STATES OF AMERICA, Plaintiff,

v.

SCHINE CHAIN THEATRES, INC., et al., Defendants

Appearances:

Robert L. Wright, Louis B. Schwartz, Special Assistants to the Attorney General; Wendell Berge, Assistant Attorney-General; George L. Grobe, United States Attorney; for plaintiff; Willard S. McKay, of New York City, for Defendants; Arthur Garfield Hays, of Counsel.

OPINION OF JOHN KNIGHT, U.S.D.J.—July 5, 1946

KNIGHT, District Judge:

The Decision of this court in this suit directs "the entering of a decree adjudging that the defendants and their affiliated corporations be dissolved, re-aligned or reorganized in their ownership and control, so that fair competition between them and other theatres be restored and maintained; and that the determination of the question of the dissolution, re-alignment or reorganization of the parties aforesaid and the method to be employed in the accomplish-[fol. 5552] ment of the same be left to be fixed by this court after further consideration with the parties."

Pursuant to the foregoing direction, the court, together with the parties, has had under consideration the adoption of several different plans. The general features of the plan submitted, by the plaintiff have been adopted. The principal difference is that the plan as approved does not include the divestiture of the interests of the defendants in numerous towns where the defendants' now own or control the only theatre.

The plan as approved directs these things:

1. That the defendants' interests in theatres located in certain towns, except in one theatre selected by them be sold.

2. That defendants' interests in theatres located in certain towns, except in two theatres selected by them, be sold.

3. That the defendants' interests in the Riviera or Liberty and in the Monroe or Madison theatres in Rochester, N. Y., be sold.

4. That the existing pooling arrangements be made in the manner and at the time directed.

5. That the theatre interests of the defendants remaining and undisposed of under the consent order of May, 1942, be sold.

6. That a trustee as an agent of the court be appointed to make the aforesaid sales; that no defendant shall acquire any financial interest in additional theatres except after affirmatively showing that such acquisition will not unreasonably restrain competition; and that no defendant shall buy or book films for any theatre other than those in which the defendant owns a financial interest.

The decree herein also provides that its provisions may be stayed pending a final determination of any appeal. This is conditioned upon the diligent prosecution by the defendants of such appeal, so that the ultimate enforcement of this order may not be prejudiced.

[fol. 5553] The defendants submitted three so-called "Proposed Re-alignment" plans. No one of these is acceptable. The so-called proposed Re-alignment plan No. IV has been specially urged on the court. This plan contemplates the division of Schine Chain Theatres, Inc., and its subsidiaries, into three separate corporations, in one of which J. Myer Schine would own all of the stock of the New York theatres, in another of which Louis W. Schine would own all of the stock of the Ohio theatres, and the third of which Mrs. J. Myer Schine and Mrs. Louis W. Schine would own all of the stock of the Delaware, Maryland and Kentucky theatres. It proposes that J. Myer Schine own or lease and manage, buy and book for all New York theatres; Louis W. Schine own or lease and manage and buy and book for all Ohio theatres; and Mrs. J. Myer Schine and Mrs. Louis W. Schine to own or lease and manage and buy and book for all theatres in Delaware, Maryland and Kentucky. This plan does not include the divestiture of ownership in any theatre, other than would be caused by the organization of the three corporations and by the holding of the stock interests as aforesaid. The fatal objection to this plan, aside from the question of divestiture, as it appears to me, is that as a practical matter the type of violations of the law found in this suit and condemned by this Court could readily be pursued by a continuation of the three interests. The entire present interests in all this great chain of theatres would be continued in the two Schines, brothers, and their wives. Were this plan proposed with the inclusion of divestiture of the theatres of which the defendants are directed to be divested, it would justify favorable consideration. But the plan adopted by the court is more favorable to the defendants herein than such a division of the corporation together with such divestitures would be. The plan adopted by the court is not a re-alignment in the sense intended in the Decision. The direction was in the alternative. It is now made to appear that a re-alignment is not feasible.

[fol. 5554] The purpose of this and like suits by the government, under its announced policy, is not for the purpose of penalizing defendants but rather the "Restoration of

free enterprise and open competition amongst all branches of the motion picture industry.". In order to effectuate this policy the divestiture of theatres, as hereinbefore stated, is deemed necessary.

John Knight, United States District Judge.

July 5, 1946.

[fol. 5555] IN THE DISTRICT COURT OF THE UNITED STATES

[Title Omitted]

ORDER—July 5, 1946

Upon consideration of the plans heretofore filed herein by the plaintiff and the defendants for the purpose of effectuating Section III of the amended judgment heretofore entered herein, the objections filed to said plans by the said parties, and the argument of counsel with respect thereto, it is hereby

Ordered, that the following plan should be and it is adopted for said purpose:

I.

Theatre Interests to Be Divested

A. All of the defendants' interests in theatres located in the following towns, except in one theatre to be selected by them, shall be sold in the manner hereinafter outlined:

Amsterdam, New York
Ashland, Ohio
Athens, Ohio
Bellefontaine, Ohio
Bucyrus, Ohio
Cambridge, Maryland
Canandaigua, New York
Corning, New York
Cortland, New York
Delaware, Ohio
Easton, Maryland
Geneva, New York
Herkimer, New York
[fol. 5556] Ilion, New York
Kent, Ohio

Little Falls, New York
Lockport, New York
Malone, New York
Maysville, Kentucky
Middlesboro, Kentucky
Newark, New York
Norwalk, Ohio
Ogdensburg, New York
Oneonta, New York
Paris, Kentucky
Piqua, Ohio
Ravenna, Ohio
Richmond, Kentucky
Salamanca, New York
Seneca Falls, New York
Tiffin, Ohio
Watertown, New York
Van Wert, Ohio

B. All of the defendants' interest in theatres located in the following towns, except in two theatres to be selected by them, shall be sold in the manner hereinafter outlined:

Auburn, New York
Lexington, Kentucky
Oswego, New York
Wooster, Ohio

C. In Rochester, New York, the defendants shall sell all of their interest in the Riviera or Liberty Theatres and in the Monroe or Madison Theatres in the manner hereinafter outlined.

The names of the theatres which the defendants elect to retain in the towns named in paragraphs A, B, and C above shall be filed with the court within 30 days after the defendants shall have received a copy of this order.

D. The existing pooling arrangements at Fostoria and Medina, Ohio, and Syracuse, New York shall be dissolved. Such dissolution in Syracuse may be effected pursuant to the decision rendered in *United States* v. *Paramount Pictures, Inc. et al.*, on June 11, 1946, and consideration of such further orders as may be appropriate in this suit in this [fol. 5557] connection is reserved until after final judgment shall have been entered in that case. Such dissolution in

Fostoria and Medina may be effected either by dissolution of the respective corporations through which the defendants' theatre interests in these towns are jointly held with non-defendants and return of the theatres involved to the respective stockholders who owned them prior to the formation of the corporation or by a sale of the defendants' stock in such corporations. In the event that said corporations have not been dissolved as outlined above within one year from the entry of this order, the defendants' stock therein shall be sold in the manner hereinafter outlined.

E. The following theatre interests remaining undisposed of under the consent order of May 19, 1942, and more particularly described therein, shall also be sold in the manner hereinafter outlined:

Strand Theatre—Cumberland, Maryland
Ada Meade and Opera House Theatres—Lexington, Ky.
½ interest in the Margie Grand Theatre—Harlan, Ky.

II

Method of Sale

The theatre interests described in Section I hereof shall be sold as rapidly as possible upon such terms and to such purchasers as this court may approve, to the end that the theatres disposed of may operate in competition with theatres retained by the defendants. A trustee is to be appointed herein as the agent of the court for making such sales and is hereinafter designated as the trustee. Within thirty (30) days from the entry of this order the parties hereto may designate the name of a person to be appointed as trustee. In the event of their failure to agree upon the person to be so designated, the court will appoint a trustee. [fol. 5558] The trustee is hereby authorized:

(1) to examine such books and records of the defendants and make such inquiries of their employees as may be necessary to ascertain the value of the theatre interests in question;

(2) to take such action and to employ such assistance as may be necessary to negotiate and close sales of such interests, including real estate brokers, accountants, and legal counsel.

The defendants shall at all times provide the trustee with free access to the theatres to be sold, for the purpose of showing them to prospective purchasers and shall cooperate with the trustee to facilitate said sales, while continuing to maintain and operate said theatres in the ordinary and usual manner. The trustee shall present sales to the court for approval as they are negotiated and shall give reasonable notice to the defendants and the plaintiff of the terms and purchasers involved in such sales as he desires to submit for approval, to the end that they may have a fair opportunity to bring to the attention of the trustee and the court such objections as they deem appropriate.

The sales provided in Section I-E above shall be completed within six months and the remaining sales shall be completed within two years from the entry of this order, subject to such extensions with respect to specific interests as the court may grant, for good cause shown, upon the petition of the trustee or any party.

The trustee shall be compensated and his expenses paid in such amounts as the court may from time to time approve, from the proceeds of sales made by him. Said proceeds [fol. 5559] shall be deposited by him in a special account created for this purpose and disbursed only upon further orders of this court.

III

Restrictions on Future Theatre Acquisitions

No defendant shall acquire a financial interest in any additional theatres except after an affirmative showing that such acquisition will not unreasonably restrain competition. Such showing shall be made before this court upon reasonable notice to the Attorney General at Washington, D. C. No defendant shall buy or book films for any theatre other than those in which the defendant owns a financial interest.

IV

Stay

The provisions of this order may be stayed pending a final determination of any appeal taken therefrom. Such stay shall be conditioned upon the diligent prosecution by the defendants of such appeal as may be allowed them and

the maintenance and operation by them of the theatres here involved, pending such appeal, in a manner which will not prejudice the ultimate enforcement of this order.

*Entered this 2d day of July, 1946.

(S.) John Knight, United States District Judge.

[fols. 5560-5561] In United States District Court

[Title Omitted]

Defendants' Motion for Amendment, Re-settlement or Clarification of Order of July 5, 1946

The Defendants' move the Court for an Order amending and/or re-settling and/or clarifying its Order heretofore entered herein, dated July 2, 1946, and filed July 5, 1946 in the following respects:

(a) By expressly stating that the Stay provided for in Paragraph IV of said Order is effective immediately and applys to all parts of said Order, including without being limited to the provision for the filing of an election by the Defendants under Paragraph I of said Order, and the provision for the designation by the parties of a person to be appointed as Trustee under Paragraph II of said Order, and

(b) Directing the entry of a formal Judgment in conformity with the terms of said Order, or, in the alternative, designating said Order as a final appealable order.

Defendants expressly reserve all claims as to jurisdiction previously asserted.

Respectfully submitted, Willard S. McKay, Attorney for the Defendants. Arthur Garfield Hays, of Counsel.

Dated: Buffalo, New York, July 15, 1946.

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*Clerk's note—This order was actually entered on July 5th, 1946.

[fol. 5562] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

Transcript of Hearing

Proceedings before Honorable John Knight, United States District Court Judge, at Buffalo, New York, July 22, 1946.

Appearances: Honorable George L. Grobe, United States Attorney, by R. Norman Kirchgraber, Esq., Assistant U. S. Attorney, appearing in behalf of the Government.

Willard S. McKay, Esq., 630 Fifth Avenue, New York, N. Y., appearing on behalf of the Defendants.

[fol. 5563] Mr. McKay: If the Court please, I don't imagine there is anything controversial about this. It is a matter about which I spoke to your Honor in Chambers last week. I want to state first for the record that the defendants do, in fact, intend to appeal, and that they intend to prosecute the appeal vigorously. As a matter of fact, I now have in the course of preparation my assignments of error. This motion simply is designed to clarify what was the apparent intent of the Court, to-wit, that the stay provided for in the order entered July 5th applies to all parts of the order and is effective so long as we diligently prosecute our appeal. The other point is whether that order was intended to be a final judgment or whether a final judgment should be entered on the order. I might say as to that, I am indifferent. All I want to clarify is that either one or the other is the fact. At first I thought that it was your Honor's intention that judgment be entered on the order, particularly because the order may lack some of the elements of a judgment, but I note it has been docketed in the Clerk's office as a judgment, and as such it probably complies with the provisions of 54-A of the Rules of Civil Procedure with respect [fol. 5564] to judgments. It is not supported by any findings of fact, because your Honor denied our motion to take additional testimony, but that question can be adequately raised on appeal, and I am not even asking that our time to appeal shall run from today. I am not trying to get any time advantage. I am perfectly satisfied to have your Honor designate that order as a final judgment, and that our time to appeal will run from that date. I don't imagine

there will be any opposition on the part of the Government. I have not had any indication of any, and I prepared a proposed order which I would like to hand to your Honor simply stating what I have just said to you.

Mr. Kirchgraber: Appearing for the Government, your Honor, I think our views are expressed in a letter under date of July 18th—if you haven't received a copy—you have a copy of that?

Mr. McKay: I certainly have not. I have had nothing from Mr. Wright.

The Court: This letter I have says "A copy of this letter has been sent by Special Delivery to Mr. Grobe, Mr. McKay and Mr. Hays."

(Reading) "We have received a copy of the motion filed [fol. 5565] by the defendants on July 15 and desire to express the following views with respect thereto:

Insofar as the provision for the designation of a trustee is concerned, we do not believe that a stay would seriously prejudice the plaintiff, although we think it would be desirable to complete the exploration of all possibilities of agreement as to the person to be appointed prior to the final disposition of the appeal.

We think a stay as to the operation of the provision requiring the defendants to name the theatres they wish to retain until final disposition of their appeal might seriously prejudice the plaintiff in the ultimate enforcement of the order as this would make it difficult to detect during this period any manipulation of the policies of specific theatres designed to depreciate their ability to offer competition to Schine when ultimately placed in the hands of independent purchasers. We think that such a stay might also deprive the order of the finality which it should have in order to permit a proper appraisal by the Supreme Court. We do not see how the defendants can sustain any prejudice as the result of making such an election prior to the time the case [fol. 5566] is docketed in the Supreme Court and if it should appear upon final disposition that prejudice had resulted, we assume that the Court would permit the defendants to make another election upon an appropriate showing by them.

Insofar as the question raised as to the appealability of the order is concerned, we see no need for any further formal judgment. We think it is perfectly clear from the terms of the order itself that it is a final disposition from

which an appeal lies and assume that the time for taking an appeal will commence to run from the date on which disposition of this motion is made."

Mr. McKay: I don't care about that fifteen days, your Honor——

The Court: I supposed a stay applied to all of the proceedings, Mr. Kirchgraber. He asks or suggests that a stay should not be operative as to the designation of the theatres which the plaintiff intends to retain.

Mr. Kirchgraber: Has there been an application for such a stay?

Mr. McKay: A stay was provided for in the order. This order simply clarifies it. This order may come up for interpretation by some one other than your Honor.

The Court: Let me see my order. There was a final [fol. 5567] clause in the order as I remember it. "The provisions of this order may be stayed pending a final determination of any appeal taken therefrom. Such stay shall be conditioned upon the diligent prosecution by the defendants of such appeal as may be allowed them and the maintenance and operation by them of the theatres here involved, pending such appeal, in a manner which will not prejudice the ultimate enforcement of this order."

What do you want an order for now? That is part of the judgment. That covers the whole ground as far as you are concerned.

Mr. McKay: It is sufficient for me, if your Honor rules from the Bench that that applies to the entire order and that all of the order is now stayed.

The Court: I think so.

Mr. McKay: That is what I have understood all along, but you see Mr. Wright is again absent, and I have not received a letter from him.

The Court: Let me see your proposed order?

Mr. Kirchgraber: I suppose that whole latter paragraph is a conclusion.

Mr. McKay: You mean our time to run?

Mr. Kirchgraber: No, I question whether or not it is a final order within the meaning of an appealable [fol. 5568] order.

The Court: That is merely declaratory of what was done. I construe this stay as applying to all of the provisions, of the paragraphs of the plan. I think that is the way—as I

understood the Government to understand it at that time. The plan they submitted included a stay, and I take it pending an appeal.

Mr. McKay: That is entirely satisfactory to me, and I take it you also construe the order entered July 5th as a final order.

The Court: Yes.

Mr. McKay: That is also satisfactory.

The Court: I think that is the way to handle it.

Mr. McKay: It would be nice some time if, when Mr. Wright wants to oppose our motion, he would be here, do us the courtesy to come up.

The Court: I think he has clarified it.

Mr. McKay: I did not get any such letter.

The Court: They should have sent it earlier. They sent it the 18th. That was Friday. If Saturday is a holiday in New York——

Mr. McKay: My office is closed, and Mr. Wright knows it. I know it was not there by 5:30 Friday.

Mr. Kirchgraber: I think he is probably correct. I think [fol. 5569] ours came in this morning.

The Court: That is the answer to it.

Mr. McKay: There is another matter I wanted to take up with you on these theatres that are closed. From time to time leases on the theatres expire. I suppose that if we are able to renew those leases and thus preserve the status quo, that would be in accordance with your Honor's order. Of course, there may be some we are unable to renew, but if we are able to, it is our understanding that we go ahead and renew them. That will mean the status will be the same as it is now.

The Court: Your lease might run for a length of time—why shouldn't you apply to the Court for authority to renew the lease?

Mr. McKay: Well, as I see it, if we have the lease at the time the Supreme Court passes on it, and if the Supreme Court sustains your order, we will have to sell the theatre anyway. If we don't renew the lease that theatre might go out of existence. I think possibly your Honor might feel we had allowed the theatre to go to rack and ruin if we had an opportunity to renew the lease and had not done it.

The Court: It ought to be kept alive.

[fols. 5570-5571] Mr. McKay: As far as we are able to do so.

The Court: I should think so. That would be my view about it. I don't see why you should not. The Government could not be in any worse position than now if the opinion is sustained.

Mr. McKay: We have to sell it. If the opinion is reversed, we will have what we have.

The Court: I think it ought to be protected.

Mr. McKay: Thank you.

[fol. 5572] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

DEFENDANTS' ASSIGNMENT OF ERRORS—August 26, 1946

Each of the defendants, Schine Chain Theatres, Inc., Schine Theatrical Co., Inc., Schine-Lexington Corporation, Schine Enterprises Corporation, Schine Circuit, Inc., Chesapeake Theatre Corporation, J. Myer Schine, Louis W. Schine and John A. May, assigns as the errors in the record and proceedings in the above entitled case, on which the defendants intend to rely in briefs and argument in the Supreme Court of the United States, the following:—

First Assignment

The Court erred in making and entering the order and judgment filed herein on July 5, 1946, directing the divestiture of certain theatre interests and providing for the appointment of a Trustee for such purpose because the Court at the time of the making of such order was without jurisdiction to make the same.

[fol. 5573] Second Assignment

The Court erred in making and entering the order and judgment filed herein on the 5th day of July, 1946, directing the divestiture of certain theatre interests and the appointment of a Trustee for such purpose without having specially found the facts and without having separately stated its conclusions of law thereon supporting the entry of such order.

Third Assignment

The Court erred in making and entering its order and judgment, filed July 5, 1946, for the avowed purpose of effectuating section III of the amended judgment herein, without giving the defendants an adequate opportunity or any opportunity at all to comply with said section 3 without such order.

Fourth Assignment

The Court erred in making and entering its order and judgment filed July 5, 1946, for the avowed purpose of effectuating section III of the amended judgment in the absence of any evidence or finding that such order was in any way necessary to effectuate said section III.

Fifth Assignment

The Court erred in ordering the divestiture of the theatre interests described in the order entered herein on July 5, 1946 and directing the appointment of a Trustee for such purpose because such order was not warranted by any findings of fact herein or by the evidence and was contrary thereto.

[fol. 5574] Sixth Assignment

The Court erred in ordering the sale of the theatre interests described in Section I of its order of July 5, 1946, by a Trustee without allowing the defendants an opportunity for a reasonable time to sell said interests without the intervention of a Trustee, in the absence of any showing that the defendants would be either unwilling or unable to make such sale.

Seventh Assignment

The Court erred in adopting and approving by its order entered July 5, 1946 the plan of dissolution proposed by the plaintiff and designated as a plan of re-organization without having before it any evidence as to the propriety of such plan.

Eighth Assignment

The Court erred in that in and by its order of July 5, 1946, it directed a divestiture of the properties described therein in a manner which would constitute a deprivation of property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

Ninth Assignment

The Court erred in denying defendants' motion to take further testimony, dated May 22, 1946.

Tenth Assignment

The Court erred in that in and by its order of July 5, 1946, which avowedly sought the "restoration of free en- [fol. 5575] terprise and open competition amongst all branches of the motion picture industry," it ordered the divestiture of certain theatre properties without giving any consideration whatsoever to any of the following factors, to wit:

(a) The question of whether or not there had, at the time said properties were respectively acquired by the defendants, or at any other time, been any competition in said respective localities.

(b) The question of whether or not the theatre properties acquired by the defendants had been acquired for the purpose of eliminating competition or for other reasons including the desire in good faith of the previous owners to dispose of the same.

(c) The existence or non-existence, at the time of the making of the order of July 5, 1946, in the respective localities involved (including cities, towns or villages adjacent to those actually named) of any theatres other than those operated by the defendants.

(d) The probable effect upon the localities involved, of the carrying out of the divestiture directed by said order of July 5, 1946 with particular reference to the different policies, runs, admission prices, type, quality and diversity of entertainment offered, differences in character of population and the general character of the several theatres operated by the defendants in each locality affected;

and without having received any evidence or made any findings with respect to any of the above factors.

[fol. 5576] Eleventh Assignment

The Court erred in rejecting and refusing to approve the plans of realignment submitted by the defendants as not acceptable without having taken evidence with respect thereto

as requested by the defendants in their motion to take further testimony, dated May 22, 1946.

Twelfth Assignment

The Court erred in rejecting the plans of realignment submitted by the defendants on the ground that, as a practical matter, the type of violations of law found in this suit and condemned by the Court could readily be pursued by a continuation of the three interests involved in said plans, without having received any evidence as requested by the defendants as to the feasibility of said plan, and without having given any consideration to the injunctive provisions of the amended judgment herein, or to the further injunctive provisions proposed by the defendants as a part of said plan or realignment, or to the effect of the decision in the case of *United States* v. *Paramount, et al.*, in the Southern District of New York (which decision was before the Court in connection with defendants' motion for a stay, dated June 7, 1946).

Thirteenth Assignment

The Court erred in rejecting and refusing to approve the plans of realignment submitted by the defendants as not feasible and in substituting therefore the remedy expressly designated by the Court as harsh without having received any evidence as requested by the defendants as to [fol. 5577] whether or not realignment was in fact feasible, in view of its express finding that there was no evidence of any acts committed by the defendants or any of them or any course of conduct pursued by them in violation of the anti-trust laws since prior to the commencement of the trial of this case, to wit, since prior to May 19, 1942, and in view of the further fact that there was no evidence of any likelihood that any such acts would be committed or such conduct pursued by the defendants or any of them in the future.

Fourteenth Assignment

The Court erred in directing the divestiture of any of the theater interests of the defendants as necessary to prevent future violations of the anti-trust laws in view of its express finding that there was no evidence of any acts committed by the defendants or any of them or any course of conduct pursued by them in violation of the anti-trust

laws since prior to the commencement of the trial of this case, to wit, since prior to May 19, 1942, and in view of the further fact that there was no evidence of any likelihood that any such acts would be committed or such conduct pursued by the defendants or any of them in the future.

Fifteenth Assignment

The Court erred in failing to hold that the injunctive provisions contained in the amended judgment herein, dated March 29, 1946, were sufficient in and of themselves to prevent any future violations of the anti-trust laws by the defendants or any of them in view of its express finding [fol. 5578] that there was no evidence of any acts committed by the defendants or any of them or any course of conduct pursued by them in violation of the anti-trust laws since prior to the commencement of the trial of this case, to wit, since prior to May 19, 1942, and in view of the further fact that there was no evidence of any likelihood that any such acts would be committed or such conduct pursued by the defendants or any of them in the future.

Sixteenth Assignment

The Court erred in failing to hold that the injunctive provisions contained in the amended judgment herein, dated March 29, 1946, were sufficient, together with alternative remedies suggested in defendants' objections to plaintiff's plan and defendants' proposed realignment plans to prevent any future violations of the anti-trust laws by the defendants or any of them, in view of its express finding that there was no evidence of any acts committed by the defendants or any of them or any course of conduct pursued by them in violation of the anti-trust laws since prior to the commencement of the trial of this case, to wit, since prior to May 19, 1942, and in view of the further fact that there was no evidence of any likelihood that any such acts would be committed or such conduct pursued by the defendants or any of them in the future.

Seventeenth Assignment

The Court erred in rejecting the injunctive provisions contained in the amended judgment herein, dated March 29, 1946, as insufficient, together with the alternative reme- [fol. 5579] dies suggested in defendants' objections to plain-

tiff's plan and defendants' proposed realignment plans, and together with the changes in the method of doing business in the motion picture industry provided for in the decision in *United States* vs. *Paramount et al.* (which decision was before the Court as a part of defendants' motion for a stay, dated June 7, 1946), to prevent any future violations of the anti-trust laws by the defendants or any of them in view of its express finding that there was no evidence of any acts committed by the defendants or any of them or any course of conduct pursued by them in violation of the anti-trust laws since prior to the commencement of the trial of this case, to wit, since prior to May 19, 1942, and in view of the further fact that there was no evidence of any likelihood that any such acts would be committed or such conduct pursued by the defendants or any of them in the future.

Eighteenth Assignment

The Court erred in that in and by its order of July 5, 1946, it ordered a divestiture of the properties described therein as a penalty, rather than as a remedy for any alleged violations of Sections 1 and 2 of the Sherman Act.

Nineteenth Assignment

The Court erred in failing to consider in arriving at a plan of dissolution, reorganization or re-alignment, the effect of any part of the decision in *United States* v. *Paramount, et al.*, (which decision was before the Court in connection with defendants' motion for a stay dated June 7, 1946) except the limited but admitted effect of said decision [fol. 5580] with respect to the defendants theatre interests in Syracuse, New York.

Twentieth Assignment

The Court erred in ordering the sale within six months of certain theatre interests in the Strand Theatre, Cumberland, Maryland; the Ada Meade and Opera House Theatres, Lexington, Kentucky, and the Margie Grand Theatre, Harlan, Kentucky, for no reason other than the fact that these interests were mentioned in a certain consent order dated May 19, 1942, because said order expired by its terms on November 15, 1944 and has, and has had, no further force or effect since said date.

Twenty-first Assignment

The Court erred in making an order for the sale by a trustee of the theatre properties described in Section 1 of its order of July 5, 1946, because there is no evidence to show that the parties actually owning said properties are now or ever have been parties to this action, or that the Court now has or ever had the power through a trustee, or otherwise, effectively to transfer title to said properties.

Twenty-second Assignment

The Court erred in making an order for the sale by a trustee of the theatre properties described in Section 1 of its order of July 5, 1946, because there is no evidence to show who, at the date of the entry of the original judgment herein, on November 1, 1945, or at the date of the entry of said order of July 5, 1946 or at any time between said [fol. 5581] dates, were the legal owners of said properties, or that the Court had at any time acquired such jurisdiction of said properties, or the owners thereof, as to enable the Court through a trustee, or otherwise, effectively to transfer title thereto.

Twenty-third Assignment

The Court erred in ordering the sale, of the theater interests of the defendants in the Strand Theater, Cumberland, Maryland, in view of the fact that the Court had, by its order dated May 31, 1944 permitted the acquisition by the defendants of another theatre in Cumberland, Maryland, to wit, the Liberty Theatre, and excused the defendants from making any further efforts to sell the said Strand Theatre under the terms of said consent order dated May 19, 1942.

Twenty-fourth Assignment

The Court erred in ordering the divestiture of any of the theater interests of the defendants in the absence of any evidence or findings showing any causal connection between the acquisition of such interests by the defendants and the alleged wrongful conduct of the defendants as set forth in the findings of the Court.

Twenty-fifth Assignment

The Court erred in ordering the divestiture of any theatre interests in Amsterdam, N. Y. because the plain-

tiff failed to introduce any evidence with respect to said locality showing or tending to show that the acquisition by the defendants of any such interest in said locality, or [fol. 5582] the maintenance and use by the defendants of any such interest in said locality was or is the result of, or pursuant to, or has resulted in any conduct on the part of the defendants, or any of them, in violation of Sections 1 and 2 of the Sherman Act or that divestiture thereof or of any part thereof is otherwise warranted by Sections 1 and 2 of the Sherman Act.

Twenty-sixth Assignment

The Court erred in ordering the divestiture of any theatre interests in Ashland, Ohio in view of the failure of the plaintiff to introduce any evidence with respect to said locality and the failure of the Court to make any findings of fact with respect thereto.

Twenty-seventh Assignment

The Court erred in ordering the divestiture of any theater interests in Athens, Ohio in view of the failure of the plaintiff to introduce any evidence with respect to said locality and the failure of the Court to make any findings of fact with respect thereto.

Twenty-eighth Assignment

The Court erred in ordering the divestiture of any theatre interests in Auburn, N. Y. because the plaintiff failed to introduce any evidence with respect to said locality showing or tending to show that the acquisition by the defendants of any such interest in said locality, or the maintenance and use by the defendants of any such interest in said locality was or is the result of, or pursuant to, or [fol. 5583] has resulted in any conduct on the part of the defendants, or any of them, in violation of Sections 1 and 2 of the Sherman Act or that divestiture thereof or of any part thereof is otherwise warranted by Sections 1 and 2 of the Sherman Act.

Twenty-ninth Assignment

The Court erred in ordering the divestiture of any theatre interests in Bellefontaine, Ohio because the plaintiff failed to introduce any evidence with respect to said locality show-

ing or tending to show that the acquisition by the defendants of any such interest in said locality, or the maintenance and use by the defendants of any such interest in said locality was or is the result of, or pursuant to, or has resulted in any conduct on the part of the defendants, or any of them, in violation of Sections 1 and 2 of the Sherman Act or that divestiture thereof or of any part thereof is otherwise warranted by Sections 1 and 2 of the Sherman Act.

Thirtieth Assignment

The Court erred in ordering the divestiture of any theatre interests in Bucyrus, Ohio because the plaintiff failed to introduce any evidence with respect to said locality showing or tending to show that the acquisition by the defendants of any such interest in said locality, or the maintenance and use by the defendants of any such interest in said locality was or is the result of, or pursuant to, or has resulted in any conduct on the part of the defendants, or any of them, in violation of Sections 1 and 2 of the Sherman Act [fol. 5584] or that divestiture thereof or of any part thereof is otherwise warranted by Sections 1 and 2 of the Sherman Act.

Thirty-first Assignment

The Court erred in ordering the divestiture of any theatre interests in Cambridge, Maryland, in view of the failure of the plaintiff to introduce any evidence with respect to said locality and the failure of the Court to make any findings of fact with respect thereto.

Thirty-second Assignment

The Court erred in ordering the divestiture of any theatre interests in Canandaigua, N. Y. because the plaintiff failed to introduce any evidence with respect to said locality showing or tending to show that the acquisition by the defendants of any such interest in said locality, or the maintenance and use by the defendants of any such interest in said locality was or is the result of, or pursuant to, or has resulted in any conduct on the part of the defendants, or any of them, in violation of Sections 1 and 2 of the Sherman Act or that divestiture thereof or of any part thereof is otherwise warranted by Sections 1 and 2 of the Sherman Act.

Thirty-third Assignment

The Court erred in ordering the divestiture of any theatre interests in Corning, N. Y. because the plaintiff failed to introduce any evidence with respect to said locality showing or tending to show that the acquisition by the de-
[fol. 5585] fendants of any such interest in said locality, or the maintenance and use by the defendants of any such interest in said locality was or is the result of, or pursuant to, or has resulted in any conduct on the part of the defendants, or any of them, in violation of Sections 1 and 2 of the Sherman Act or that divestiture thereof or of any part thereof is otherwise warranted by Sections 1 and 2 of the Sherman Act.

Thirty-fourth Assignment

The Court erred in ordering the divestiture of any theatre interests in Cortland, New York, in view of the failure of the plaintiff to introduce any evidence with respect to said locality and the failure of the Court to make any findings of fact with respect thereto.

Thirty-fifth Assignment

The Court erred in ordering the divestiture of any theatre interests in Delaware, Ohio, in view of the failure of the plaintiff to introduce any evidence with respect to said locality and the failure of the Court to make any findings of fact with respect thereto.

Thirty-sixth Assignment

The Court erred in ordering the divestiture of any theatre interests in Easton, Maryland, in view of the failure of the plaintiff to introduce any evidence with respect to said locality and the failure of the Court to make any findings of fact with respect thereto.

[fol. 5586] Thirty-seventh Assignment

The Court erred in ordering the divestiture of any theatre interests in Geneva, N. Y. because the plaintiff failed to introduce any evidence with respect to said locality showing or tending to show that the acquisition by the defendants of any such interest in said locality, or the maintenance and use by the defendants of any such interest

in said locality was or is the result of, or pursuant to, or has resulted in any conduct on the part of the defendants, or any of them, in violation of Sections 1 and 2 of the Sherman Act or that divestiture thereof or of any part thereof is otherwise warranted by Sections 1 and 2 of the Sherman Act.

Thirty-eighth Assignment

The Court erred in ordering the divestiture of any theatre interests in Herkimer, N. Y. because the plaintiff failed to introduce any evidence with respect to said locality showing or tending to show that the acquisition by the defendants of any such interest in said locality, or the maintenance and use by the defendants of any such interest in said locality was or is the result of, or pursuant to, or has resulted in any conduct on the part of the defendants, or any of them, in violation of Sections 1 and 2 of the Sherman Act or that divestiture thereof or of any part thereof is otherwise warranted by Sections 1 and 2 of the Sherman Act.

[fol. 5587] Thirty-ninth Assignment

The Court erred in ordering the divestiture of any theatre interests in Ilion, N. Y. because the plaintiff failed to introduce any evidence with respect to said locality showing or tending to show that the acquisition by the defendants of any such interest in said locality, or the maintenance and use by the defendants of any such interest in said locality was or is the result of, or pursuant to, or has resulted in any conduct on the part of the defendants, or any of them, in violation of Sections 1 and 2 of the Sherman Act or that divestiture thereof or of any part thereof is otherwise warranted by Sections 1 and 2 of the Sherman Act.

Fortieth Assignment

The Court erred in ordering the divestiture of any theatre interests in Kent, Ohio, in view of the failure of the plaintiff to introduce any evidence with respect to said locality and the failure of the Court to make any findings of fact with respect thereto.

Forty-first Assignment

The Court erred in ordering the divestiture of any theatre interests in Lexington, Ky. because the plaintiff failed to introduce any evidence with respect to said locality showing or tending to show that the acquisition by the defendants of any such interest in said locality, or the maintenance and use by the defendants of any such interest in said locality was or is the result of, or pursuant to, or has resulted in [fol. 5588] any conduct on the part of the defendants, or any of them, in violation of Sections 1 and 2 of the Sherman Act or that divestiture thereof or of any part thereof is otherwise warranted by Sections 1 and 2 of the Sherman Act.

Forty-second Assignment

The Court erred in ordering the divestiture of any theatre interests in Little Falls, N. Y. because the plaintiff failed to introduce any evidence with respect to said locality showing or tending to show that the acquisition by the defendants of any such interest in said locality, or the maintenance and use by the defendants of any such interest in said locality was or is the result of, or pursuant to, or has resulted in any conduct on the part of the defendants, or any of them, in violation of Sections 1 and 2 of the Sherman Act or that divestiture thereof or of any part thereof is otherwise warranted by Sections 1 and 2 of the Sherman Act.

Forty-third Assignment

The Court erred in ordering the divestiture of any theatre interests in Lockport, N. Y. because the plaintiff failed to introduce any evidence with respect to said locality showing or tending to show that the acquisition by the defendants of any such interest in said locality, or the maintenance and use by the defendants of any such interest in said locality was or is the result of, or pursuant to, or has resulted in any conduct on the part of the defendants, or any of them, in violation of Sections 1 and 2 of the Sherman [fol. 5589] Act or that divestiture thereof or of any part thereof is otherwise warranted by Sections 1 and 2 of the Sherman Act.

Forty-fourth Assignment

The Court erred in ordering the divestiture of any theatre interests in Malone, N. Y. because the plaintiff

failed to introduce any evidence with respect to said locality showing or tending to show that the acquisition by the defendants of any such interest in said locality, or the maintenance and use by the defendants of any such interest in said locality was or is the result of, or pursuant to, or has resulted in any conduct on the part of the defendants, or any of them, in violation of Sections 1 and 2 of the Sherman Act or that divestiture thereof or of any part thereof is otherwise warranted by Sections 1 and 2 of the Sherman Act.

Forty-fifth Assignment

The Court erred in ordering the divestiture of any theatre interests in Maysville, Kentucky, in view of the failure of the plaintiff to introduce any evidence with respect to said locality and the failure of the Court to make any findings of fact with respect thereto.

Forty-sixth Assignment

The Court erred in ordering the divestiture of any theatre interests in Middlesboro, Kentucky, in view of the failure of the plaintiff to introduce any evidence with respect to said locality and the failure of the Court to make any findings of fact with respect thereto.

[fol. 5590] Forty-seventh Assignment

The Court erred in ordering the divestiture of any theatre interests in Newark, N. Y. in view of the failure of the plaintiff to introduce any evidence with respect to said locality and the failure of the Court to make any findings of fact with respect thereto.

Forty-eighth Assignment

The Court erred in ordering the divestiture of any theatre interests in Norwalk, Ohio, because the plaintiff failed to introduce any evidence with respect to said locality showing or tending to show that the acquisition by the defendants of any such interest in said locality, or the maintenance and use by the defendants of any such interest in said locality was or is the result of, or pursuant to, or has resulted in any conduct on the part of the defendants, or any of them, in violation of Sections 1 and 2 of the Sherman Act or that divestiture thereof or of any part thereof is

otherwise warranted by Sections 1 and 2 of the Sherman Act.

Forty-ninth Assignment

The Court erred in ordering the divestiture of any theatre interests in Ogdensburg, N. Y. because the plaintiff failed to introduce any evidence with respect to said locality showing or tending to show that the acquisition by the defendants of any such interest in said locality, or the maintenance and use by the defendants of any such interest in said locality was or is the result of, or pursuant to [fol. 5591] or has resulted in any conduct on the part of the defendants, or any of them, in violation of Sections 1 and 2 of the Sherman Act or that divestiture thereof or of any part thereof is otherwise warranted by Sections 1 and 2 of the Sherman Act.

Fiftieth Assignment

The Court erred in ordering the divestiture of any theatre interests in Oneonta, New York, in view of the failure of the plaintiff to introduce any evidence with respect to said locality and the failure of the Court to make any findings of fact with respect thereto.

Fifty-first Assignment

The Court erred in ordering the divestiture of any theatre interests in Oswego, New York, in view of the failure of the plaintiff to introduce any evidence with respect to said locality and the failure of the Court to make any findings of fact with respect thereto.

Fifty-second Assignment

The Court erred in ordering the divestiture of any theatre interests in Paris, Ky. because the plaintiff failed to introduce any evidence with respect to said locality showing or tending to show that the acquisition by the defendants of any such interest in said locality, or the maintenance and use by the defendants of any such interest in said locality was or is the result of, or pursuant to, or has resulted in any conduct on the part of the defendants, or any of them, in violation of Sections 1 and 2 of the [fol. 5592] Sherman Act or that divestiture thereof or of any part thereof is otherwise warranted by Sections 1 and 2 of the Sherman Act.